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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

CRISPUS NIX, Warden of the Iowa State Penitentiary,
Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS
FOR THE EIGHTH CIRCUIT**

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April 7, 1983

QUESTIONS PRESENTED

1. Whether the Court of Appeals exceeded its authority in reaching out to an issue not presented to or litigated in the state or federal trial courts in order to reverse a denial of habeas corpus by the District Court?

2. Whether the Court of Appeals violated the dispositional rule in *Jackson v. Denno*, 378 U.S. 368 (1964), by mandating a third new trial rather than remanding the case for a limited proceeding where reversal was based on an issue of constitutional fact which arose only on appeal and on which the State has not had a fair opportunity to present evidence?

3. Whether the Court of Appeals correctly concluded, on the record before it, that the State could not show lack of bad faith on the part of police, when, as the Iowa Supreme Court unanimously observed, "the propriety of police conduct ... has caused the closest possible division in every appellate court which has considered the question....?" *State v. Williams*, 285 N.W.2d 248, 260 (Iowa 1979) (A. 45)

4. Whether the inevitable discovery exception to the exclusionary rule requires the State to show lack of subjective bad faith on the part of police officers?

5. Whether the rule in *Stone v. Powell*, 428 U.S. 465 (1977) should be extended to a Sixth Amendment case where highly probative and reliable physical evidence is challenged in a habeas proceeding after a full and fair opportunity to raise the issue on direct review in state courts?

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Petitioner Crispus Nix, Warden of the Iowa State Penitentiary, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals granting respondent herein a writ of habeas corpus on January 10, 1983 (rehearing denied and suggestion for rehearing en banc denied by an equally divided court, March 15, 1983).

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, and the orders denying rehearing and rehearing en banc, also not reported, appear in the Appendix hereto. The unreported opinion of the United States District Court for the Southern District of Iowa, *Williams v. Nix*, Civ. No. 80-450-D (S.D. Iowa Dec. 18, 1981), and the opinion of the Iowa Supreme Court, *State v. Williams*, 285 N.W.2d 248 (Iowa 1979) also appear in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on January 10, 1983. Timely petitions for rehearing and rehearing en banc were denied on March 15, 1983, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Amendment Six

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

United States Code, Title 28

Section 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

This Court is already familiar with the tragic character of this 15 year old proceeding since it has been here before on certiorari. See *Brewer v. Williams*, 430 U.S. 387 (1977). A brief review of the underlying facts and legal posture of the case demonstrates the urgent need for authoritative review by this Court.

On Christmas Eve, 1968, ten year old Pamela Powers disappeared from the Des Moines YMCA where she had been watching a wrestling match with her family. Suspicion focused on

Williams, an escaped mental patient residing at the YMCA, who was seen leaving the building with a large bundle wrapped in a blanket. A boy who helped Williams open his car door testified that he viewed the bundle and "saw two legs in it and they were skinny and white." 430 U.S. at 390.

Law enforcement officials began a massive search to find Williams who eventually surrendered to police in Davenport, Iowa, some 160 miles from Des Moines. While transporting Williams back to Des Moines from Davenport, Detective Cletus Leaming obtained information from Williams about the whereabouts of the girl's body. Following Williams' directions, the police uncovered the body of Pamela Powers. Medical examination of the corpse revealed presence of acid phosphatase, a component of semen, in her body, as well as pubic hairs on the victim's clothing "like" those of Williams. *See Williams v. Nix*, No. 82-1140, slip. op. at 8 (8th Cir. Jan. 10, 1983) (Appendix 7-8, hereinafter "A").

Williams was tried and convicted of first degree murder. At trial, the State introduced the articles of clothing, evidence relating to the body's discovery and condition, and incriminating statements made to Detective Leaming by the defendant. 430 U.S. at 394. The conviction was affirmed in a five to four decision by the Iowa Supreme Court, *State v. Williams*, 182 N.W.2d 396 (Iowa 1970). On collateral review, however, the United States District Court for the Southern District of Iowa sustained Williams' petition for a writ of habeas corpus, *Williams v. Brewer*, 375 F.Supp. 170 (S.D. Iowa 1974) and a divided panel of the United States Court of Appeals for the Eighth Circuit affirmed. 509 F.2d 227 (8th Cir. 1974)

This Court, in a 5-4 decision, affirmed the grant of the writ. *Brewer v. Williams*, 430 U.S. 387 (1977). The majority found that an agreement had been made between Williams' attorney and unnamed Des Moines police officers that the defendant would not be interrogated on his way back to Des Moines. 430

U.S. at 391. The Court further found that Detective Leaming, while avoiding directly questioning Williams, did nevertheless attempt to elicit information from him by making statements about the victim's need for a decent Christian burial. 430 U.S. at 399. The majority found Leaming's action violated the defendant's right to counsel guaranteed by the Sixth and Fourteenth Amendments and held that introduction of evidence discovered as a result of the interrogation was erroneous and required reversal. 430 U.S. at 406.

In an important footnote, however, the Court majority noted that while communicative evidence from the defendant could not be constitutionally admitted under any circumstance, the physical evidence, the body and its condition:

might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams. (citation omitted) In the event that a retrial is instituted, it will be for the state courts in the first instance to determine whether particular items of evidence may be admitted.

430 U.S. at 441, n.12.

The State retried Williams and sought to introduce evidence about the body under the "inevitable discovery" exception to the exclusionary rule alluded to in the above footnote. A suppression hearing was held in state court at which the defense contested the prosecution's claim that the body "would have been discovered in any event." 430 U.S. at 441, n.12. The state trial court heard testimony regarding the law enforcement search efforts in the area where the body was eventually found. The trial court, held that the body would have been discovered anyway and denied Williams' motion to suppress. See *State v. Williams*, 285 N.W.2d 248, 260-62 (1979) (A.46-8).

With testimony about the body and its condition admitted, Williams was again convicted of first degree murder. The Iowa

Supreme Court sua sponte raised the question of whether the State must show that police did not act in bad faith for the purpose of hastening discovery of the body before it could constitutionally invoke the inevitable discovery exception. *State v. Williams*, 285 N.W.2d 248, 260 (Iowa 1979) (A.40-1). The Iowa Court found such a requirement, but unanimously held that on the record the State had plainly satisfied the test. The Court stated:

The issue of the propriety of the police conduct in this case, as noted earlier in this opinion, has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.

State v. Williams, 285 N.W.2d 248, 260 (Iowa 1979) (A.45).

Williams then launched another assault on his conviction in federal district court. He raised seven other questions not now before the Court. With respect to the application of the inevitable discovery exception, Williams limited his challenge to reargument of the defense position before the state trial court, namely, that the body would not, in fact, have been "inevitably discovered" because of the lack of thoroughness in the police search and the difficulty in observing a snow covered body.

The District Court denied the writ, holding, *inter alia*, that the inevitable discovery exception existed and was properly invoked. *Williams v. Nix*, Civ.No. 80-450-D slip. op. at 6-11 (S.D.Iowa Dec. 18, 1981) (A.75-80) The District Court opinion contained no mention of the nonlitigated, lack-of-bad-faith issue. On appeal, the Court of Appeals for the Eighth Circuit reversed. A three-judge panel held that "the State did not satisfy its burden of proving by a preponderance of evidence that the police did not act in bad faith in obtaining Williams'

statements that led them to the body." *Williams v. Nix*, No. 82-1140, slip. op. at 18 (8th Cir. Jan. 10, 1983) (A.17).

The State then sought rehearing both before the original panel and en banc. On March 15, the original panel denied rehearing. In a four page opinion, the court, while noting "concessions" made by the state in oral argument, also held that admission of the challenged physical evidence "would impermissibly reduce the deterrent effect of the exclusionary rule." *Williams v. Nix*, slip. op. at 2 (Mar. 15, 1983) (reh'g denied) (A.23).

On the same day, the Court of Appeals denied rehearing en banc by a 4-4 vote. Judge Fagg joined by Judges Bright and Ross, filed a dissenting opinion noting that the lack of bad faith issue "has not been placed in issue or litigated in the state and federal trial courts." *Williams v. Nix*, slip. op. at 1 (Mar. 15, 1982) (reh'g en banc denied) (A.20). He noted that the State and the defense both viewed the inevitable discovery exception at trial as having "only *one* prong, inevitable discovery of the body, and that was the issue presented to the trial judge." *Id.* at 2 (emphasis in original) (A.20). Only later did the Iowa Supreme Court inject the second prong, good faith, into the case. Rather than remand the case "to the trial court for a limited evidentiary hearing," the Iowa Supreme Court "ruled as a matter of law that Officer Leaming acted in good faith." *Id.* at 3 (A.21). The dissent thus argued, at a minimum, that some kind of limited remand should be considered. *Id.*

The Court, on its own motion, stayed the order and issuance of the mandate for thirty days from the date of filing to allow the State to seek a writ of certiorari. The Court further ordered that the stay would continue until final disposition by this Court.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises Serious Questions About The Appropriate Role Of A Federal Appellate Court Reviewing Collateral Attacks On State Court Judgments.

This Court has recently given clear direction that lower federal courts exercise extreme caution in overturning state court convictions. *Engle v. Issac*, ____ U.S. ____, 102 S.Ct. 1558 (1982); *Rose v. Lundy*, ____ U.S. ____, 102 S.Ct. 1198 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Stone v. Powell*, 428 U.S. 465 (1977). Yet in this case the Court of Appeals not only overturned a conviction on an issue not raised in the trial courts, but refused to allow the State an opportunity on remand to show it could meet a new, unanticipated constitutional requirement discovered for the first time by the appellate courts after trial.

At Williams' second trial, the State attempted to free testimony about the body and its condition from the taint of interrogation found to be illegal in *Brewer v. Williams* by showing that the evidence would have been discovered independent of any illegality. See 430 U.S. 387, 406 n.12 (1977). In its suggestion of the inevitable discovery rule, this Court said nothing about lack of bad faith on the part of the police officers, nor did the case cited by the court as an example of the rule. *Killough v. United States*, 336 F.2d 959 (D.C. Cir. 1964). Consequently, no proof of a lack of bad faith was made or attempted by the prosecution in the state court suppression hearing. The defense did not challenge the absence of proof of lack of bad faith. The issue on which the Court of Appeals reversed the District Court, namely, the failure of the State to show lack of bad faith on the part of Detective Leaming, thus was not litigated in the state trial court.

On review, the Iowa Supreme Court embraced an inevitable discovery rule which required the State to show lack of bad faith by police officers. While Williams had not raised the issue in his

brief or at oral argument, the Iowa Supreme Court sua sponte accepted as proof of lack of bad faith the uncertain state of the law as applied to the police officer's conduct in question. *State v. Williams*, 285 N.W.2d 248, 260 (1979) (A.45).

In his habeas corpus action in United States District Court, Williams did not, in the pleadings or in the more than 90 pages of briefs and arguments, ever once directly or indirectly challenge or even refer disparagingly to the Iowa Supreme Court's findings or conclusion on the lack of bad faith issue. The subject was not mentioned in oral argument before the District Court. Not until his brief in the Court of Appeals, in three conclusory lines and perfunctory footnote, did Williams make *any* mention of a challenge to the Iowa Supreme Court's lack of bad faith conclusion.

The State thus had no real notice that the lack of bad faith was actually being challenged. Williams had not in any substantial way briefed the issue, nor had the State. Counsel for both parties focused their arguments on a series of other issues not now before the court. The issue was not raised by Williams' counsel in oral argument until questioned from the bench.

The lack of bad faith question simply was not properly presented to the Court of Appeals notwithstanding the discussion at oral argument. As this Court has stated earlier in this prolonged litigation, in considering whether *Stone v. Powell*, 430 U.S. 387 (1977), applied to challenges to Williams' first conviction:

The *Stone* issue was not mentioned in any of the briefs, including petitioners' reply brief filed September 29, 1976 - some three months after our decision in *Stone* was announced. The possible relevance of *Stone* was raised by a question from the bench during oral argument. This prompted brief comments by counsel for both parties (citations omitted). *But in no meaningful sense can the issue be viewed as having been 'argued' in this case.*

430 U.S. 387, 414 n.3 (Justice Powell concurring) (emphasis supplied).

The general rule is that an issue not raised in District Court is not considered when raised on appeal. *Singleton v. Wulff*, 428 U.S. 106 (1976). This rule is generally enforced in habeas corpus cases. *Holiday v. Wyrick*, 663 F.2d 789 (8th Cir. 1981), *Zaehring v. Brewer*, 635 F.2d 734 (8th Cir. 1980). The State believes whether an issue not litigated below and not fully presented on appeal is within the grasp of a federal appellate court reviewing denial of habeas corpus is a serious question worthy of authoritative review.

The panel opinion of the Court of Appeals denying rehearing noted that "the State's brief did not argue that it had never had a chance to prove good faith. Nor did it argue [on appeal] that the issue had not been raised in the District Court." *Williams v. Nix*, slip. op. at 4 (8th Cir. Mar. 15, 1983) (reh'g denied) (A.26). The Court of Appeals panel thus declared that the State was foreclosed from raising a new argument on rehearing, even though the defendant Williams was allowed to prevail on a new argument on appeal not presented below. The Court of Appeals made extraordinary allowances for the defendant, but did not afford similar treatment to the State. Regardless of the ultimate outcome of this case, this procedural double standard does not properly balance the competing demands of fairness to the defendant with the needs of the criminal justice system in the adversarial process and should not be allowed to stand as precedent in the Circuit.

Moreover, by refusing to remand the case for a limited evidentiary hearing, the Court of Appeals not only decided the case without a record, but also assumed what the record would show if the issue had been litigated below. After surveying previous opinions in this case, the Court of Appeals declared with apparent confidence that Detective Leaming's activities were "not the actions of a man who believed he was doing the

right thing, only to be confounded later on a close vote on a question of law.” *Williams v. Nix, supra*, slip. op. at 18 (8th Cir. Mar. 15, 1983) (reh’g denied) (A.17).

But such a sweeping conclusion by an appellate court reviewing a state court conviction is unfounded where the State has not been afforded an opportunity to make a record in an evidentiary proceeding on a newly injected constitutional issue. It is surely not inconceivable that the State could meet its burden if given an opportunity. In this case, *Miranda* warnings were given no less than five times to the accused. See *Brewer v. Williams*, 430 U.S. at 415 (Burger, C.J., dissenting). And, it seems obvious that Detective Leaming himself was trying to honor what he thought was the key legal requirement of *Miranda*, namely, *noninterrogation*. As he told Williams after talking to him in the car, “I do not want you to answer me. I do not want to discuss it further.” See 430 U.S. at 393. While Leaming may later have been judged by a narrow majority in the Supreme Court of the United States to have crossed the constitutional line, findings in the case on other issues demonstrates at least some police sensitivity to Williams’ constitutional rights.

Given the absence of appropriate proceedings below, the panel’s order reversing Williams’ second conviction is contrary to consistent holdings of this Court. In *Jackson v. Denno*, 378 U.S. 368 (1964), this Court held that procedures used by New York to determine the voluntariness of a confession did not comport with due process. But the Court did not reverse the conviction. As the Court observed:

We cannot assume that New York will not now afford Jackson a hearing that is consistent with the requirements of due process. Indeed, New York thought it was affording Jackson such a hearing, and not without support in the decisions of this Court . . .

Similarly, in *United States v. Wade*, 388 U.S. 218 (1967), this Court found a violation of the right to counsel at a lineup. The Court, however, reversed the Court of Appeals order for a new trial, ordering the case back to the trial court for a hearing on whether there was an independent basis for an in-court identification. 388 U.S. at 244. The Court noted that "whether [the] in-court identification had an independent origin . . . was not an issue at trial, although there is some evidence relevant to a determination." 388 U.S. at 242. The initial determination on the question, the Court held, was best made at trial court. *Id.*

If resolution of the lack of bad faith issue is necessary for disposition of the case, a substantial argument can be made that the cause should be remanded either to federal district court or to state court for appropriate evidentiary proceedings. The State urges this Court to review the question to reinforce the now seriously eroded authority of *Jackson* and *Wade*, to provide supervision to the lower federal courts, and to promote efficiency in the criminal justice system.

2. Review By This Court Is Required To Resolve A Conflict Among The Courts Of Appeals As To Whether The Inevitable Discovery Exception To The Exclusionary Rule Requires The State To Show Lack Of Bad Faith On The Part Of Police Officers Before It May Be Invoked.

The Court of Appeals, conceding *arguendo* that an inevitable discovery exception exists, held that the State had not made a sufficient showing of lack of subjective bad faith on the part of Detective Leaming in order to invoke the exception. See *Williams v. Nix*, slip. op. 13-14 (8th Cir. Mar. 15, 1983) (reh'g denied) (A.12). This Court, however, has never suggested that the State must prove lack of subjective bad faith before availing itself of the inevitable discovery exception. Indeed, the footnote in *Brewer v. Williams* is totally devoid of any discussion of a lack of bad faith requirement. And, the leading case relied on by the Court discusses only the need to show that the body

would have been discovered eventually notwithstanding the illegally-seized evidence. *Killough v. United States*, 336 F.2d 929 (D.C. Cir. 1964).

The holding of the Court of Appeals decision is not only contrary to *Killough* but also to decisions in the Third, Fifth and Ninth Circuits. In *United States v. Brookings*, 614 F.2d 1037 (5th Cir. 1980), the Court of Appeals for the Fifth Circuit did not require a showing of bad faith but "simply a reasonable probability that the evidence in question would have been discovered other than by the tainted source." 614 F.2d at 1042, n.2. Similarly, in *United States v. Schmidt*, 573 F.2d 1057 (9th Cir. 1978), the Court of Appeals for the Ninth Circuit holds that evidence which almost certainly would have been discovered is admissible without further inquiry. 573 F.2d 1065, n.9. And, in *Government of the Virgin Islands v. Gereau*, 502 F.2d 914 (3rd Cir. 1974), the Court of Appeals for the Third Circuit allowed introduction of a weapon where the state demonstrated "that police and FBI agents would have found the luger even without Smith's statement." 502 F.2d at 927. Resolution of the conflict between the Eighth and Third, Fifth, Ninth and D.C. Circuits on the elements required to invoke the inevitable discovery exception requires exercise of this Court's certiorari jurisdiction.

Even if the State must show lack of bad faith, however, there is no clear authority for the proposition that the inquiry is *subjective* in nature as assumed by the panel in this case. *Williams v. Nix*, slip. op. at 13 (8th Cir. Mar. 15, 1983) (reh'g denied). Probing into the depths of human motivation is always difficult and in view of the State would be an unworkable approach to the inevitable discovery exception. See Kaplan, *Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1045, 1047 (1974). The State believes that if there is a lack of bad faith constitutional requirement, an *objective* approach to police conduct is far more desirable. Cf. *Harlow v. Fitzgerald*, ___ U.S. ___, 50 U.S.L.W. 4815 (BNA) (U.S. Jan. 24, 1982) (objective good faith for prosecutorial immunity). Under an objective test, the

question would be whether police officers could reasonably believe their actions were constitutionally permissible. As applied to the present case, where courts and the best legal minds have been closely divided, the answer, as the Iowa Supreme Court unanimously concluded in this case, is clearly yes. *State v. Williams*, 285 N.W.2d 248, 260 (Iowa 1979) (A.45).

The contours of a lack of bad faith requirement, if any, were not developed in this litigation for the reasons outlined above in Part 1. It is respectfully suggested that if the issue was appropriately raised in the appellate court, the question of what is required before the inevitable discovery exception is invoked is worthy of this Court's consideration.

3. The Decision Below Raises The Important Question Of Whether *Stone v. Powell* Should Be Extended To Sixth Amendment Cases Where Highly Probative And Reliable Physical Evidence Is Challenged In A Habeas Proceeding After A Full And Fair Opportunity To Raise The Issue On Direct Review In State Courts?

This case also squarely raises the applicability of the doctrine of *Stone v. Powell*, 428 U.S. 465 (1977), in a non-Fourth Amendment context. The Court of Appeals dismissed the argument, noting erroneously that this Court "necessarily rejected" extension of *Stone* in *Williams v. Brewer*. *Williams v. Nix*, *supra*, slip. op. at 12 n.8 (A.11). The question, however, was expressly left open when this case was previously before the Court. *Brewer v. Williams*, 430 U.S. at 414 (Powell, J., concurring). One other case is presently before the Court which raises the issue of extension of *Stone* to non-Fourth Amendment cases. *White v. Finkbeiner*, 687 F.2d 885 (7th Cir. 1982), *petition for cert. filed sub. nom. Fairman v. White*, 51 U.S.L.W. 3001 (BNA) (U.S. June 18, 1982) (No. 81-2340).

The entire rationale of *Stone v. Powell* applies with full force to this Sixth Amendment case involving highly probative and reliable physical evidence. Police will be adequately deterred by

the possibility of losing convictions on direct appeal. The marginal deterrence value of relitigating the issue on collateral attack is minimal. And the interest in promoting finality in criminal judgments will be promoted. See 428 U.S. at 492-4.

The reason *Stone v. Powell* has not been generally applied outside the Fourth Amendment is not because Fifth and Sixth Amendment violations should be categorically excluded from its reach because of some abstract reason or because the Fifth and Sixth Amendments are more highly placed in the constitutional hierarchy. Rather, Fifth and Sixth Amendment violations are generally not linked with highly reliable physical evidence that nearly universally characterizes Fourth Amendment search and seizure cases. The State believes the focus of the analysis in applying *Stone* should be on the nature of evidence gathered, not the type of constitutional violation which occurred.

The issue presented here is thus not whether *Stone v. Powell* applies to *all* cases where the right to counsel has been infringed. There may be occasions, for instance, where impairment of the right to counsel so undermines the fundamental fairness of the criminal proceeding that federal courts should not lightly relinquish their habeas jurisdiction. Rather, the issue is whether *Stone v. Powell* should be extended to non-Fourth Amendment claims where highly probative and reliable physical evidence has been obtained.

The case materially differs from those concerning the suppression of confessions allegedly obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), to which *Stone v. Powell* might also be extended. Unlike here where physical evidence is involved, introduction of communicative evidence obtained from the accused in violation of *Miranda* often affects the fairness and accuracy of the criminal process. And, also unlike this case, litigants in *Miranda* cases could simply transform their challenge from a comparatively narrow attack on whether *Miranda* strictures were followed into a more broadly based

assault on the voluntariness of their confession, thereby reopening the door of the federal courthouse. *White v. Finkbeiner*, *supra*, 687 F.2d at 892-3.

The case for extending *Stone v. Powell* in the present context is even more compelling since the state courts found that the challenged evidence would have been discovered anyway notwithstanding the alleged constitutional violation. Thus, not only has the highly probative evidence survived the gauntlet of direct review, but its admission has also been buttressed on a theory that frees it from the taint of underlying constitutional infraction.

Nothing in *Rose v. Mitchell*, 443 U.S. 545 (1978), is to the contrary. In this case, the Court refused to extend *Stone v. Powell* to claims of discrimination in the selection of a grand jury. In *Rose*, the Court doubted that a full and fair hearing of the claim would be available in state courts since the appointing trial court would initially decide the merits of the claim. 403 U.S. at 561. Further, the Court noted a constitutionally protected right was at stake, not a judicially created remedy. 403 U.S. at 562. Finally, the Court noted that, unlike in *Stone*, "the deterrent effect of federal review is likely to be great, since state officials . . . may be expected to take note of a federal court's determination that their procedures are unconstitutional and must be changed." 443 U.S. at 563. None of those distinguishing features are present in the case at bar.

Consideration of this modest extension of *Stone v. Powell* by the Court would be of substantial benefit to the federal judiciary. While the courts have generally declined to extend *Stone v. Powell* to non-fourth Amendment cases, considerable doubt can be found in the opinions. See, e.g., *White v. Finkbeiner*, 687 F.2d 885 (7th Cir. 1982), *petition for cert. filed sub. nom Fairman v. White*, ____ U.S. ____ 51 U.S.L.W. 3001 (BNA) (U.S. June 18, 1982) (No. 81-2340); see *Satchell v. Cardwell*, 653 F.2d 408, 409, n.6 (9th Cir. 1981), *Sallie v. North*

Carolina, 587 F.2d 636, 641-42 (4th Cir. 1978), *cert. denied* 441 U.S. 911 (1979). Similarly, the commentators seem sharply divided on the meaning, scope and continued vitality of *Stone*. See, e.g., Comment, *Development of Federal Habeas Corpus Since Stone v. Powell*, 1979 Wis.L.Rev. 1145; Soloff, *Litigation and Relitigation: The Uncertain Status of Federal Habeas Corpus for State Prisoners*, 6 Hofstra L.Rev. 297 (1978); Cover & Aleinkoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035 (1977). Regardless of the ultimate result on the merits, a grant of certiorari in this case would give this Court the opportunity to provide substantial guidance to the lower courts in their exercise of federal habeas jurisdiction.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 82-1140

Robert Anthony Williams,
Appellant,

v.

Crispus Nix, Warden of the Iowa State Penitentiary,
Appellee.

On Appeal From The United States District Court
for the Southern District of Iowa

Submitted: November 8, 1982

Filed: January 10, 1983

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit
Judge, and ARNOLD, Circuit Judge.

ARNOLD, Circuit Judge.

In *Brewer v. Williams*, 430 U.S. 387 (1977), the Supreme Court set aside the murder conviction of appellant Robert Anthony Williams because statements leading the police to the body of the victim had been obtained from Williams in violation of his Sixth and Fourteenth Amendment right to counsel. Williams was tried again, and evidence of the discovery of the body and its condition was again admitted against him, this time on the theory, suggested in a footnote in the Supreme Court's opinion, that "the body would have been discovered in any

event," 430 U.S. at 407 n.12, even in the absence of the statements unconstitutionally obtained from the defendant. After the Supreme Court of Iowa affirmed the second conviction, *State v. Williams*, 285 N.W.2d 248 (Iowa 1979), defendant again sought federal habeas relief, which the District Court denied, *Williams v. Scurr*, No. 80-450-D (S.D. Iowa December 18, 1981). Both the Supreme Court of Iowa and the District Court adopted the "inevitable discovery" or "hypothetical independent source" exception to the exclusionary rule and upheld the second conviction on that basis, finding that the State had proved that the body would have been discovered in any event and that the police had not acted in bad faith in obtaining the excluded statements from defendant. We hold that the record cannot support a finding that the State proved the police did not act in bad faith. We therefore reverse and remand with instructions that the writ issue unless the State commences proceedings to try defendant again within 60 days of this Court's mandate.¹

I.

On Christmas Eve 1968 the Powers family went to see a wrestling match at the YMCA in Des Moines. Pamela Powers, their ten-year-old daughter, excused herself to go to the bathroom. She did not come back. A little while later, Robert Anthony Williams, a resident of the YMCA, was seen leaving the building with a bundle wrapped in a blanket. Williams, a black man known as "Reverend," had escaped from a mental hospital in Missouri, where he had been a patient for three years, without the knowledge, presumably, of the Des Moines YMCA. Two days later, Pamela Powers's body was found in a

¹ In addition to his attack on the inevitable-discovery doctrine, Williams advances six other grounds for setting aside his conviction. We express no view as to their merit. He also claims that the District Court should have disqualified itself. We disagree. The District Court properly declined to recuse itself, for the reasons stated in Judge Viotor's memorandum filed June 11, 1981.

ditch east of Des Moines, as a result of statements made by Williams to the police under circumstances to be fully described later. Williams was tried and convicted of deliberate, premeditated murder, and his conviction was affirmed by the Supreme Court of Iowa, *State v. Williams*, 182 N.W.2d 396 (Iowa 1970). On habeas, however, the District Court, *Williams v. Brewer*, 375 F. Supp. 170 (S.D. Iowa 1974), set this first conviction aside, and this Court, 509 F.2d 227 (8th Cir. 1974), and the Supreme Court, *Brewer v. Williams*, *supra*, affirmed.

The Supreme Court's reasons for invalidating the first conviction are of course the law of this case and are an important part of the background necessary for an understanding of the issues that now arise on this habeas challenge to Williams's second conviction. The defendant, after leaving the YMCA in Des Moines on December 24, turned up in Rock Island, Illinois, two days later. He telephoned Henry McKnight, a lawyer in Des Moines, and McKnight advised him to turn himself in to the police in Davenport, Iowa. Williams did surrender in Davenport, and McKnight went to the police station in Des Moines to speak with the authorities there. "As a result of these conversations, it was agreed between McKnight and the Des Moines police officials that Detective Learning [of the Des Moines police] and a fellow officer would drive to Davenport to pick up Williams, that they would bring him directly back to Des Moines, and that they would not question him during the trip." *Brewer v. Williams*, *supra*, 430 U.S. at 391. The Supreme Court then described what happened next, *id.* at 392-93:

The two detectives, with Williams in their charge, then set out on the 160-mile drive. At no time during the trip did Williams express a willingness to be interrogated in the absence of an attorney. Instead, he stated several times that "[w]hen I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." Detective Learning knew that Williams was a former mental patient, and knew also that he was deeply religious.

The detective and his prisoner soon embarked on a wide-ranging conversation covering a variety of topics, including the subject of religion. Then, not long after leaving Davenport and reaching the interstate highway, Detective Leaming delivered what has been referred to in the briefs and oral arguments as the "Christian burial speech." Addressing Williams as "Reverend," the detective said:

"I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

Williams asked Detective Leaming why he thought their route to Des Moines would be taking them past the girl's body, and Leaming responded that he knew the body was in the area of Mitchellville—a town they would be passing

on the way to Des Moines.¹ Leaming then stated: "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road."

As the car approached Grinnell, a town approximately 100 miles west of Davenport, Williams asked whether the police had found the victim's shoes. When Detective Leaming replied that he was unsure, Williams directed the officers to a service station where he said he had left the shoes; a search for them proved unsuccessful. As they continued towards Des Moines, Williams asked whether the police had found the blanket, and directed the officers to a rest area where he said he had disposed of the blanket. Nothing was found. The car continued towards Des Moines, and as it approached Mitchellville, Williams said that he would show the officers where the body was. He then directed the police to the body of Pamela Powers.

¹ The fact of the matter, of course, was that Detective Leaming possessed no such knowledge.

The Court then held that the use of Williams's statements against him violated his Sixth and Fourteenth Amendment right to the assistance of counsel. "Detective Leaming," it said, "deliberately and designedly set out to elicit information from Williams just as surely as - and perhaps more effectively than - if he had formally interrogated him. . . . [H]e purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible." *Id.* at 399. The Court further held that Williams had not waived his right to counsel and that "so clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned." *Id.* at 406. The judgment of this Court granting habeas corpus was affirmed.

It was in this setting that Williams was tried for the second time. This time the State did not offer his own statements in evidence against him, nor did it seek to show that the police had

been led to the victim's body by the defendant. The prosecution did, however, introduce evidence of the discovery of the body and various articles of the victim's clothing, including photographs and results of scientific tests. An evidentiary hearing on defendant's motion to suppress this evidence was held by the District Court of Polk County, Iowa.² The evidence was uncontestably discovered as a direct result of defendant's unconstitutionally obtained statements, so it was, absent some exception, clearly excludable as "fruit of the poisonous tree." The State argued that the evidence would have been discovered in any event, and cited a footnote in the Supreme Court's opinion:

¹² The District Court stated that its decision "does not touch upon the issue of what evidence, if any, beyond the incriminating statements themselves must be excluded as 'fruit of the poisonous tree.' " 375 F. Supp. 170, 185. We, too, have no occasion to address this issue, and in the present posture of the case there is no basis for the view of our dissenting Brethren, *post*, at 430 (White, J.); *post*, at 441 (Blackmun, J.), that any attempt to retry the respondent would probably be futile. While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams. *Cf. Killough v. United States*, 119 U.S. App. D. C. 10, 336 F.2d 929. In the event that a retrial is instituted, it will be for the state courts in the first instance to determine whether particular items of evidence may be admitted.

430 U.S. at 406-07 n.12.

² The case was later transferred to Linn County for trial on defendant's motion for change of venue.

The state trial court denied the motion to suppress, and held admissible articles of clothing, and photographs of articles of clothing, found on the body, evidence concerning the condition of the body, and the results of medical, chemical, or pathological tests performed on the body. The court found that the State had proved by a preponderance of the evidence that the body would have been discovered in any event, because a police search for the body would have continued, and the body would have been found in substantially the same condition in which it was found. Freezing temperatures, the court found, would have preserved the body from decomposition even into April of 1969. *State v. Williams*, No. CR 55805 (Dist. Ct. Polk County, Iowa, May 31, 1977), found in Appendix filed in *State v. Williams*, No. 61228 Crim. (Sup. Ct. Iowa, App. filed July 31, 1978), p. 137.¹

The case then went to trial, and the disputed evidence was introduced against defendant. The defense conceded that Williams had left the YMCA with the little girl's body, but claimed that someone else had killed her and placed her body in Williams's room in the hope that suspicion would focus on him. Williams, the theory went, then panicked, fled, and hid the body by the side of a road, until he came to his senses and gave himself up two days later. The theory is not so far-fetched as it sounds. The State contended that the murder was related to sexual abuse of the victim, and in fact acid phosphatase, a component of semen, was found in her body. But no traces of spermatozoa, living or dead, were found either in the body or on Pamela's clothing. One inference that could be drawn is that the victim was attacked by a sterile male. Williams is concededly not sterile. The State's witnesses suggested that sperm, initially present, had been destroyed by freezing, but this theory was arguably inconsistent with the hypothesis, earlier urged and ac-

¹ This Appendix will be referred to in this opinion as "App."

cepted in connection with the motion to suppress, that extreme cold would preserve the body's condition, not change it. The defense called experts who testified that freezing would not destroy sperm cells. In addition, although pubic hairs said by an FBI expert to be "like" those of the defendant were found on the victim's clothing, so were other pubic hairs concededly belonging neither to Williams nor to the victim.⁴ In any event, the jury found defendant guilty of first-degree murder, and he was sentenced to life in prison. He has been in the Iowa State Penitentiary since his first conviction in 1969.

On appeal, the Supreme Court of Iowa again affirmed. It held that there is in fact a "hypothetical independent source" exception to the exclusionary rule. The exception was stated as follows:

After the defendant has shown unlawful conduct on the part of the police, the State has the burden to show by a preponderance of the evidence that (1) the police did not act in bad faith for the purpose of hastening discovery of the evidence in question, and (2) that the evidence in question would have been discovered by lawful means.

State v. Williams, 285 N.W.2d 248, 260 (Iowa 1979). As to the first element, the Court stated:

The first question, then, is whether the police acted in bad faith for the purpose of hastening discovery of the body of Pamela Powers. While there can be no doubt that the method upon which the police embarked in order to

⁴ We do not reach defendant's claim that the evidence of premeditation and deliberation was constitutionally insufficient under *Jackson v. Virginia*, 443 U.S. 307 (1979). We mention some of the factual disputes at trial only to show that defendant's guilt is not undisputed.

gain Williams's assistance was both subtly coercive and purposeful, and that its purpose was to discover the victim's body, see 430 U.S. at 393, 399, 97 S.Ct. at 1236-37, 1240, 51 L.Ed.2d at 433, 437, we cannot find that it was in bad faith. The issue of the propriety of the police conduct in this case, as noted earlier in this opinion, has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.

Id. at 260-61. As to the second element, the trial court's finding that the body "would have been found in essentially the same condition it was in at the time of the actual discovery," *id.* at 262, even in the absence of assistance from the defendant, was approved.

II.

Our analysis of this case makes it unnecessary to decide whether to recognize the inevitable-discovery or hypothetical-independent-source exception to the rule excluding evidence obtained in violation of the Sixth Amendment right to counsel. We assume *arguendo* that there is such an exception and that the opinion of the Supreme Court of Iowa in this case correctly states the requirements for establishing it. The exception as thus stated requires the State to prove two things: that the police did not act in bad faith, and that the evidence would have been discovered in any event. We hold that the State has not met the first requirement. It is therefore unnecessary to decide whether the state courts' finding that the body would have been

discovered anyway is fairly supported by the record.⁵ It is also unnecessary to decide whether the State must prove the two elements of the exception by clear and convincing evidence, as defendant argues, or by a preponderance of the evidence, as the state courts held.

The state trial court, in denying the motion to suppress, made no finding one way or the other on the question of bad faith.⁶ Its opinion does not even mention the issue and seems to proceed on the assumption - contrary to the rule of law later laid down by the Supreme Court of Iowa - that the State needed to show only that the body would have been discovered in any event. The Iowa Supreme Court did expressly address the issue, in words that we have quoted, and a finding by an appellate court of a state is entitled to the same presumption of correctness that attaches to trial-court findings under 28 U.S.C. §2254(d). *Sumner v. Mata*, 449 U.S. 539, 545-47 (1981). We conclude, however, that the state Supreme Court's finding that

⁵ At the oral argument the question whether the bad-faith element of the test might be dispensed with was raised from the bench, but counsel for the State expressly disclaimed any such position. We agree with counsel and with the Supreme Court of Iowa that if there is to be an inevitable-discovery exception the State should not receive its benefit without proving that the police did not act in bad faith. Otherwise the temptation to risk deliberate violations of the Sixth Amendment would be too great, and the deterrent effect of the exclusionary rule reduced too far. The Supreme Court's footnote in *Brewer v. Williams* makes no reference to a bad-faith prong of the test, but we do not read the footnote as intended to be a full-dress statement of the inevitable-discovery exception and its requirements. The footnote does not even establish that there is such an exception (though it may imply it), and the Court in a later case, *United States v. Crews*, 445 U.S. 463, 475 n.22 (1980) (plurality opinion), found it unnecessary to address the issue.

⁶ The District Court's opinion denying habeas corpus does not discuss the bad-faith question explicitly.

the police did not act in bad faith is not entitled to the shield of §2254(d), for two reasons. First, the Iowa court's discussion of bad faith is not really a finding of fact at all. It is more like a legal conclusion that police conduct later found constitutionally blameless by a large minority of this Court and the Supreme Court cannot amount to bad faith. To put it another way, if four Supreme Court Justices believe something, it must be reasonable.⁷ And if the bad-faith passage in the Supreme Court of Iowa's opinion is regarded as a finding of fact that Detective Leaming, though he later turned out to be wrong, honestly believed that his conversation with Williams was not a violation of the Sixth Amendment, the finding must still be rejected. It is utterly without record support, for reasons that we shall explain later in some detail. The finding (if that is what it is) is thus "not fairly supported by the record," and paragraph (8) of §2254(b) permits us to examine the bad-faith question unhampered by any presumption.⁸

If the state court's opinion is read as holding as a matter of law that Detective Leaming did not act in bad faith because one judge of this Court (or three, if the votes to grant rehearing en banc are counted) and four members of the Supreme Court later voted not to exclude the fruits of his effort, then we respectfully

⁷ This Court and the Supreme Court are not alone in being divided on this case. On the first appeal, the Supreme Court of Iowa affirmed Williams's conviction by a vote of five to four. *State v. Williams*, 182 N.W.2d 396 (Iowa 1970).

⁸ The State suggests that *Stone v. Powell*, 428 U.S. 465 (1976), precludes federal habeas review of the admission of evidence regarding the body. We disagree for several reasons. We read *Stone* as limited to Fourth Amendment claims, and the Supreme Court's opinion in *Brewer v. Williams* supports that reading. In fact, the dissenting opinion of the Chief Justice, 430 U.S. at 415, 420-29, argues, citing *Stone*, that federal habeas review of the claim that evidence should have been excluded should not be available - a position that the Court necessarily rejected. And the State itself, Brief of Appellee p. 28, seems to concede that *Stone* would in any event bar federal habeas only if a lack of bad faith has been shown.

disagree with the Supreme Court of Iowa. An opinion of the Supreme Court is no less declaratory of the law of the land when a bare majority joins it. The majority rules, in courts as in legislatures, and one vote is a decisive margin. Law is an art, not a science, and it often happens, especially in cases complex and important enough to attract the Supreme Court's attention, that questions of great moment do not receive unanimous answers. We note that the Supreme Court's opinion refers to Detective Leaming's conduct as "*so clear* a violation of the Sixth and Fourteenth Amendments . . . [that it] cannot be condoned." 430 U.S. at 406 (emphasis supplied). There is a sense, we suppose, in which a case decided by one vote is anything but "clear," but we judges of an inferior court are not permitted such speculation.

It is true that a proposition of law subscribed to by four Supreme Court Justices (or perhaps even one) must in some fashion be objectively "reasonable," but that does not meet the issue presented here. The question before us is not whether the Supreme Court's opinion in *Brewer v. Williams* is fairly debatable as a legal matter. Obviously it is. The question is rather what was in Detective Leaming's mind during that car ride back to Des Moines. If he honestly thought he was not violating Williams's rights, then the deterrent purpose of the exclusionary rule would arguably not be impaired by allowing proof of facts that would have come to light in any event. But if he had no such honest belief, and if the courts later hold his conduct unlawful, it matters not how close the division was among the judges. The relevant question - bad faith - is subjective. Possibly if Detective Leaming testified that he thought he was behaving constitutionally, and later the courts unanimously decided otherwise, based on clear preexisting law, the very clarity of the courts' action might be thought to cast a doubt on the truthfulness of the testimony. Could a proposition so lacking in legal support actually have been believed by an officer of the law?, one might ask. But this is not this case. Here, the question

is the reverse: Does the closeness of a later judicial decision necessarily establish that conduct approved by a minority of judges is not in bad faith? We think not. If Leaming conversed with Williams in deliberate violation of the Sixth Amendment, the evidence must be excluded.

We turn, then, to the factual question of Leaming's state of mind at the time. On this question the State concededly has the burden of proof. If the evidence is in equipoise, or if there is no evidence either way, the State must lose. Yet there is not a line of evidence in the record before us that Detective Leaming thought he was within the Constitution. No court, state or federal, has ever so found, and it is not hard to see why, given the state of this record. We do not even have a self-serving statement from Leaming himself that he was unaware of any constitutional violation.⁹

The opinions of the Supreme Court and of the various concurring Justices in *Brewer v. Williams* furnish some fairly strong clues as to how that Court might resolve the bad-faith issue (though footnote 12 of the Court's opinion must mean that that issue, like other aspects of the inevitable-discovery doctrine, was to be open for exploration at the second trial and subsequent post-conviction proceedings). Not only does the Court refer to the Sixth Amendment violation as "clear," 430 U.S. at 406. It

⁹ Leaming did not testify at the second trial or at the motion-to-suppress hearing held after the Supreme Court set aside the first conviction. Nor did any other witness testify as to his motivation. There was also no testimony by Leaming at the evidentiary hearing before the District Court on the second habeas petition. Leaming did testify at the motion-to-suppress hearing before the first trial, but the record before us contains only three pages of this testimony, see App. 125-27, and they do not concern the witness's state of mind vis-a-vis Williams's constitutional rights. The transcript of the first trial and of the motion-to-suppress hearing that preceded it is not before us, but we feel sure that if it contained testimony tending to show Leaming's lack of bad faith the State would have called it to our attention.

also describes Leaming's course of conduct as undertaken "deliberately," "designedly," and "purposely," *id.* at 399, and labels the situation before it as "constitutionally indistinguishable from" a previous Supreme Court decision, *Massiah v. United States*, 377 U.S. 201 (1964). The Court did not think it was breaking new ground, or holding Detective Leaming to a standard of conduct not theretofore clearly established.

Justice Marshall, concurring, stated that "there can be no doubt that Detective Leaming consciously and knowingly set out to violate Williams' Sixth Amendment right to counsel and his Fifth Amendment privilege against self-incrimination,"¹⁰ as Leaming himself understood those rights." *Id.* at 407. Justice Powell, concurring, remarked that "the entire setting was conducive to the psychological coercion that was successfully exploited." *Id.* at 412. He took the position, at least as to Fourth Amendment violations, that "a distinction should be made between flagrant violations by the police, on the one hand, and technical, trivial, or inadvertent violations, on the other," but emphasized that "[h]ere, we have a Sixth Amendment case and also one in which the police deliberately took advantage of an inherently coercive setting in the absence of counsel, contrary to their express agreement. Police are to be commended for diligent efforts to ascertain the truth, but the police conduct in this case plainly violated [Williams's] constitutional rights." *Id.* at 413-14 n.2. And Justice Stevens, concurring, observed that "the State cannot be permitted to dishonor its promise to this lawyer." *Id.* at 415 (footnote omitted).¹¹

¹⁰ The Court's opinion did not reach the Fifth Amendment issue.

¹¹ *But see* 430 U.S. at 439 (Blackmun, J., dissenting) (an intention to find out where the little girl was "does not equate with an intention to evade the Sixth Amendment.") (footnote omitted).

Our study of the record confirms these hints in the opinions of the Justices in the majority. Not only has the State not borne its burden of proof; what evidence there is on the subject strongly points in the direction of bad faith. In the first place, every court, state or federal, that has made a finding on the issue has found that the police broke an express promise to Henry McKnight, Williams's Des Moines lawyer. The trial court so found before the first trial, see *State v. Williams*, *supra*, 182 N.W.2d at 402; *id.* at 406 (Stuart, J., dissenting); the District Court so found in the first habeas proceeding, *Williams v. Brewer*, *supra*, 375 F. Supp. at 173; and by the time the case reached this Court for the first time the breach of the agreement was no longer in dispute, *Williams v. Brewer*, *supra*, 509 F.2d at 229; *id.* at 236 n.1 (Webster, J., dissenting). The word of the police, like that of everyone else, should be good. The broken promise might be justified if Detective Leaming was hoping (after two days of exposure to freezing temperatures) to find the victim alive. But Leaming did not so testify, and, though it could not be known that Pamela was dead, any hope of finding her alive must have been forlorn. In any event, McKnight had told Leaming that after he and Williams had had a chance to confer in Des Moines the police would be told where to find the body. Leaming did not wish to wait. Instead, as we said on the prior appeal, "the specific purpose of . . . [Leaming's] conversation with . . . [Williams] was to obtain statements and information from . . . [him] concerning the missing girl before . . . [he] could consult with Mr. McKnight." 509 F.2d at 231. Leaming wanted, it seems, not merely to find Pamela or her body, but also to obtain statements from Williams that might be used against him. See 430 U.S. at 408 (Marshall, J., concurring); 375 F. Supp. at 179.

At the oral argument the State did not question that Leaming broke his word, or that he deliberately and designedly set out to elicit information from Williams. It suggested, though, that deliberately seeking information is different from deliberately

violating constitutional rights. Doubtless this is true as a matter of abstract logic. But several aspects of this record are inconsistent with such a reconstruction of Leaming's motivation. The promise not to question Williams was not the only promise broken. Leaming also promised McKnight to bring Williams straight to Des Moines, see 430 U.S. at 391, and this promise also was not kept. Leaming seems to have decided to break his promise not to question Williams almost immediately after the promise was made. Upon arriving in Davenport to pick Williams up, and before beginning the return trip, Leaming told his prisoner that " 'we'll be visiting between here and Des Moines.' " *Ibid.* Thereafter, Williams's Davenport counsel, a lawyer named Kelly, reminded Leaming of his commitment, but "Leaming expressed some reservations." *Id.* at 392. Kelly asked to be allowed to ride back in the car with his client, but this request was refused. Then, in the car, Leaming told Williams that he knew the body was in the area of Mitchellville, although "[t]he fact of the matter, of course, was that Detective Leaming possessed no such knowledge." *Id.* at 393 n.1. We do not wonder that the Supreme Court of Iowa described these tactics as "both subtly coercive and purposeful," 285 N.W.2d at 260, and that the trial court, in its opinion on the motion to suppress made before the second trial, referred to the "U.S. Supreme Court's findings that . . . [the Christian burial] speech was a sly and clever psychological ploy, *designed for mental coercion of the defendant . . .*" App. 136-37 (emphasis supplied). The State seems not to have asked the trial court to make a finding on the issue of bad faith, and, as we have noted, it did not do so. This quotation from its opinion may indicate what that finding would have been. A design to obtain incriminating evidence by mental coercion is a design to violate the Constitution.

Nor is this a case where the police, having successfully devised a means of obtaining evidence, then forthrightly admitted the facts and defended the legality of their own conduct. On the contrary, Leaming disputed the claim that he had agreed with

McKnight not to question Williams on the way back to Des Moines. He also contradicted Kelly's testimony that he had been refused permission to ride back with Williams, and that he had told Leaming that Williams was not to talk with him until they reached Des Moines. The District Court in the first habeas case explicitly resolved these three conflicts in testimony against Leaming, 375 F. Supp. at 176, 177, and the state trial court found as a fact, contrary to Leaming's testimony, that the agreement with McKnight had been made, and expressed "explicit doubts as to the testimony of Detective Leaming." *Id.* at 176 (footnote omitted). These are not the actions of a man who believed he was doing the right thing, only to be confounded later on by a close vote on a question of law.

We hold that the State did not satisfy its burden of proving by a preponderance of the evidence that the police did not act in bad faith in obtaining Williams's statements that led them to the body. Under the inevitable-discovery rule as laid down by the Supreme Court of Iowa, which we accept *arguendo* for the purposes of this appeal, the motion to suppress should have been granted. Williams's conviction was obtained in violation of the Sixth Amendment, and it must be set aside.

III.

It will inevitably be remarked that our opinion focusses more on the conduct of the police than of the alleged murderer. If Williams is indeed guilty, and if he goes free as a result of our holding, then complete justice may not have been done, even though Williams has served 14 years in prison. A system of law that not only makes certain conduct criminal, but also lays down rules for the conduct of the authorities, often becomes complex in its application to individual cases, and will from time to time produce imperfect results, especially if one's attention is confined to the particular case at bar. Some criminals do go free because of the necessity of keeping government and its servants in their place. That is one of the costs of having and en-

forcing a Bill of Rights. This country is built on the assumption that the cost is worth paying, and that in the long run we are all both freer and safer if the Constitution is strictly enforced.

The judgment of the District Court is reversed. This cause is remanded to it with directions to issue the writ of habeas corpus releasing Williams from custody, unless the State within 60 days of the issuance of our mandate commences proceedings to try Williams again. Our action is also without prejudice to the right of the appropriate authorities of the State of Iowa to commence a civil-commitment proceeding against appellant.

It is so ordered.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH
CIRCUIT.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 82-1140

Robert Anthony Williams,
Appellant,

v.

Crispus Nix, Warden of the
Iowa State Penitentiary,
Appellee.

Appeal from the United
States District Court
for the Southern District
of Iowa

Filed: March 15, 1983

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS,
McMILLIAN, ARNOLD, JOHN R. GIBSON and
FAGG, Circuit Judges

ORDER

The petition for rehearing en banc is denied by an equally divided court.

FAGG, Circuit Judge, dissenting, joined by BRIGHT and ROSS, Circuit Judges.

I dissent from the order denying rehearing en banc.

I offer two reasons for an en banc submission:

First, the panel, in deciding the case, has relied upon a proposition that has not been placed in issue or litigated in the state and federal trial courts: whether Officer Leaming acted in bad faith in obtaining Williams' statement concerning the location of the murdered child's body.

Second, the case is one of significance in Iowa, involving a capital offense where the defendant has been convicted on two occasions by separate juries in different geographical locations within the state.

Specifically, the following chronology supports an en banc hearing:

First, in *Brewer v. Williams*, 430 U.S. 387 (1977), the Supreme Court observed by footnote that the state might gain the admissibility of the murdered child's body under a theory of inevitable discovery.

Second, taking the lead offered by the Supreme Court footnote, an inevitable discovery theory was presented to a state trial judge prior to Williams' second trial in a motion to suppress. The prosecutor and defense counsel apparently viewed the contested theory as having only *one* prong, inevitable discovery of the body, and that was the issue presented to the trial judge. This would explain why the ruling of the trial judge made "no finding one way or the other on the question of bad faith" and why the ruling "does not even mention the [bad faith] issue and seems to proceed on the assumption - contrary to the law *later* handed down by the Supreme Court of Iowa - that the State needed to show only that the body would have been discovered in any event". Eighth Circuit Slip opinion at 10, 11. (Emphasis added). I am of the impression that a single issue, inevitable discovery, was involved in the suppression hearing and that the trial court participants should not be charged with anticipating that the case would turn on a good faith/bad faith dichotomy.

Third, after the second trial, Williams appealed to the Iowa Supreme Court. *State v. Williams*, 285 N.W.2d 248 (Iowa 1979). As a matter of first impression, the court adopted a two pronged inevitable discovery rule. Instead of recognizing that one of the prongs had been litigated in the trial court (inevitable discovery) and the other had not (absence of bad faith), and remanding the case to the trial court for a limited evidentiary hearing, the Iowa Supreme Court did exactly what our panel says it did, namely, in the absence of evidence it ruled as a matter of law that Officer Leaming had acted in good faith.

Fourth, when Williams' petition for habeas relief was presented to District Judge Vietor, the issue formulation, submission, and resolution was the same as it had been in the state trial court: the question of inevitable discovery was at issue, the question of the officer's bad faith was not.

Finally, as I read the panel opinion, I cannot satisfy myself that the issue of the officer's good or bad faith has *ever* been the subject of an evidentiary hearing. If I am correct, then our panel is not in a position comfortably to find as a matter of law that Officer Leaming acted in bad faith, and this court is obligated to consider whether or not some form of limited remand is in order before putting its final imprint upon the case.

For the above reasons I believe the petition for rehearing en banc should be granted.

Judge Gibson also votes to grant the rehearing en banc.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH
CIRCUIT

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 82-1140-SI

September Term 1982

Appeal from the United States
District Court for the
Southern District of Iowa

Robert Anthony Williams,
Appellant,

vs.

Crispus Nix, Warden and
Attorney General of State of
Iowa,
Appellees.

On the Court's own motion, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

March 15, 1983

APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 82-1140

Robert Anthony Williams,
Appellant,

v.

Crispus Nix, Warden of the
Iowa State Penitentiary,
Appellee.

On Appeal from the United States
District Court for the District
of Iowa.

Filed: March 15, 1983

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit
Judge, and ARNOLD, Circuit Judge.

OPINION ON PETITION FOR REHEARING

ARNOLD, Circuit Judge.

The Court has before it the petition for rehearing filed by the appellee, directed to the panel that heard this appeal. The petition is denied.¹

¹ Appellee also filed a petition for rehearing en banc, which is being denied in a separate order entered today.

We deem it appropriate to add a few limited comments with respect to some of the arguments made for the first time in the petition for rehearing.

1. The State argues that the inevitable-discovery exception to the rule excluding evidence obtained in violation of the Sixth Amendment should be available to it even if the police conduct in this case was in bad faith. (It does not argue that this Court's holding, on the record presently before it, that the State had not proved a lack of bad faith was erroneous.) As already indicated in our opinion filed January 10, 1983, *Williams v. Nix*, F.2d (8th Cir. 1983), this argument is contrary to an express concession made by the State at the oral argument before us.² In the course of the oral argument, counsel for the State stated, Tr. 20, that "I really don't argue with the application of the good faith rule." A few minutes later, a member of the Court brought the matter up again, and the following colloquy occurred:

Judge Arnold: Let me go back a minute, Mr. McGrane, and read to you what I wrote down that you said a minute ago. I want to see if you really meant this. "I really don't argue with the application of the good faith rule."

Mr. McGrane: Well, I think I'm in a position here where I'm trying to argue for the Iowa Supreme Court's dissertation on the exclusionary rule. I think it's an exceptional analysis and dissertation on the rule and they apply the good faith rule. So I think that the lack of bad faith is where it would hurt us, but I think the lack of bad faith rule should be included. Does that answer the question, I hope.

² A transcript of the tape of the oral argument has been prepared, and copies have been furnished to counsel. The Clerk is directed to file the transcript as part of the records of this case.

Judge Arnold: Yes, sir, it does.

Mr. McGrane: I'd like to leave it in there and I'd like to have this Court find that in fact there was a lack of bad faith.

Both because of this concession, and because to hold otherwise would impermissibly reduce the deterrent effect of the exclusionary rule, see our previous opinion, slip op. at p. 10 n.5, we adhere to our holding that the State, in order to avail itself of the inevitable-discovery exception, should have to prove by a preponderance of the evidence that the police did not act in bad faith.

2. The State also suggests that even if lack of bad faith must be shown, the appropriate standard is objective, not subjective. That is, was the conduct of the police objectively reasonable? Again, we adhere to our previous view that the important question is the state of mind of the police officer at the time that the conduct later held to be unconstitutional occurred. Since the purpose of the exclusionary rule is to deter unconstitutional conduct, exceptions to the rule should not be permitted unless the police honestly believed that they were not behaving unconstitutionally. Again, an exchange between the bench and counsel for the State during oral argument is relevant.

Judge Henley: Is it a question of what he did or what he thought he did?

Mr. McGrane: I think it's what he thought he was doing. That's good faith.

Tr. 21. See also Tr. 18 (Mr. McGrane: "That's not bad faith because he thought the way he was doing it was legal.")

3. Finally, the State argues that to impose a good-faith requirement at this point in the case is unfair to it. At the time of the hearing on the motion to suppress before the second trial, it says, no one knew that lack of bad faith was relevant, and

therefore the State made no attempt to prove this element of the inevitable-discovery exception. It is unfair, the argument runs, for this Court now to hold the conviction invalid on the basis of an issue as to which the State has never been allowed to present proof. The suggestion is made that some kind of remand take place for a hearing, either in the District Court or in the state courts, at which the State would be allowed to attempt to show that no bad faith was involved.

We respectfully disagree with this suggestion for several reasons. The bad-faith question came into the case, in so many words, when the Supreme Court of Iowa decided the appeal from the second conviction. It was the Supreme Court of Iowa, not this Court, that brought the bad-faith issue into the case. It is the opinion of the Supreme Court of Iowa that first pointed out the crucial nature of the issue. No complaint was made by the State at that time that a new issue had been unfairly raised. The opinion of the District Court also mentions the absence of bad faith as one element of the inevitable-discovery doctrine, and again neither side claimed that the question was being unfairly injected into the case.

On the appeal to this Court, both sides briefed the good-faith issue. The State's brief did not argue that it had never had a chance to prove good faith. Nor did it argue that the issue had not been raised in the District Court. It claimed, instead, relying on the rationale of the Supreme Court of Iowa, that it *had* proved good faith. The State did not ask for another chance to satisfy the good-faith prong of the inevitable-discovery doctrine. Then, at the oral argument, the issue became sharper still. As the portions of the oral argument already quoted make clear, there was no suggestion by the State that this Court should not rule on the good-faith issue, or that some kind of additional evidentiary hearing should be held. Indeed, counsel for the State went so far as to say that "I'd like to leave it [the question of bad faith] in there and I'd like to have this Court find that in fact there was a lack of bad faith."

In these circumstances, we cannot agree that fairness requires that the State be given a new chance to show that its agent did not act in bad faith. At the time of the hearing on the motion to suppress, the State was the proponent. It had the burden of proof. It was offering evidence that had been obtained in a way that the Supreme Court of the United States had held unconstitutional. It was given an evidentiary hearing on the issue of admissibility. If, through a mistake of law, it failed to make its case, that should be the end of the matter. It is as if the State had failed to prove one element of the crime, and later argues that it should be given another chance.

The petition for rehearing is denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH
CIRCUIT.

APPENDIX E

STATE of Iowa, Appellee,

v.

Robert Anthony WILLIAMS, Appellant.

No. 61228.

Supreme Court of Iowa.

Nov. 14, 1979.

Rehearing Denied Dec. 13, 1979.

Gerald W. Crawford, Des Moines, and Robert Bartels, Iowa City, for appellant.

Thomas J. Miller, Atty. Gen., Faison T. Sessoms, Asst. Atty. Gen., Dan L. Johnston, Polk County Atty., Robert J. Blink and Rodney J. Ryan, Asst. Polk County Attys., for appellee.

Considered by LeGRAND, P. J., and REES, HARRIS, ALLBEE, and McGIVERIN, JJ.

ALLBEE, Justice.

This is an appeal by Robert Anthony Williams from his conviction, on retrial, for first degree murder, a violation of sections 690.1 and 690.2, The Code 1966. The charge arose out of the death of Pamela Powers, which occurred on December 24, 1968.

Williams was initially tried and convicted of this crime in 1969. On appeal from that conviction he contended that the police had obtained certain statements from him in an unlawful manner and that those statements should have been suppressed. This court rejected his argument and, in a five to four decision, affirmed the conviction. *State v. Williams*, 182 N.W.2d 396 (Iowa 1970). Defendant then petitioned the United States District Court for the Southern District of Iowa for a writ of

habeas corpus. That court held that defendant's statements had been obtained in violation of his right to counsel and privilege against self-incrimination and sustained the petition. *Williams v. Brewer*, 375 F.Supp. 170 (S.D.Iowa 1974). A divided panel of the court of appeals affirmed. 509 F.2d 227 (8th Cir.1974). After petitions for rehearing and rehearing en banc were denied by the court of appeals, the Supreme Court granted certiorari, 423 U.S. 1031, 96 S.Ct. 561, 46 L.Ed.2d 404 (1975), and affirmed, also by a vote of five to four. *Brewer v. Williams*, 430 U.S. 337, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

The facts out of which the prosecution arose have been set out in the prior opinion of this court and in the opinions of the court of appeals and Supreme Court. Factual statements in this opinion will therefore be limited to those necessary to the discussion of the individual issues which defendant has raised. Those issues are considered in the order in which they were presented by his brief.

1. *Rejection of defendant's choice of appointed counsel.* Defendant first complains because trial court refused to appoint Sheldon Otis, of San Francisco, California, as co-counsel for the defense. He claims that as an indigent defendant he had at least a qualified right to select particular attorneys for his defense. Mr. Otis is a member of the bars of California and Michigan with extensive experience in felony trials, and had previously appeared in an Iowa criminal case.

Defendant applied for appointment of counsel on April 14, 1977, stating that he was indigent, that his counsel in the federal habeas corpus action, Robert Bartels, could not represent him in this trial due to previous commitments, and that Mr. Otis was willing and able to undertake representation of defendant. He also requested the appointment of co-counsel for Mr. Otis and stated that Gerald W. Crawford of Des Moines was willing to accept such an appointment. Attached to the application was Williams's affidavit of indigency and a supporting certificate by

a counselor at the state penitentiary, where Williams was incarcerated. No request for a hearing was contained in the application.

On April 21, 1977, District Judge Ray Hanrahan entered an order appointing counsel for defendant. The order recited that the court had conferred with defendant's prior counsel, Mr. Bartels, that defendant was indigent and required appointed counsel, and that prior counsel could not continue his representation. It also recited the court's findings that defendant's interests would be better served by appointment of local counsel and that pre-trial matters and the orderly processing of the case would be facilitated by local counsel. It therefore appointed Roger P. Owens and John C. Wellman, both of the Polk County Offender Advocate's Office, and Gerald W. Crawford as co-counsel for defendant.

Then, on April 27, Williams filed a motion for substitution of counsel, requesting that Mr. Otis be appointed in place of either Mr. Owens and Mr. Wellman, or Mr. Crawford. This motion requested a hearing. Defendant alleged that he was fearful of the effect of community pressure and publicity upon Des Moines counsel and asserted that he had a right under the State and Federal Constitutions and section 775.4, The Code 1977 (current version at Iowa R.Crim.P. 8(1) & 26), to choose the attorneys to be appointed for him. The motion argued that trial court's concerns about pre-trial matters and the orderly processing of the case could be adequately met by the appointment of local co-counsel and stated that Mr. Otis would not claim any transportation expenses. Thus his services would incur no special expense for the state. The motion also noted that Judge Hanrahan had stated that Mr. Otis would have been permitted to appear if he had been retained by Williams.

District Judge J. P. Denato treated the motion as a motion for reconsideration of the ruling on defendant's application for appointment of counsel. Because the motion was treated as one

for reconsideration, and because the original application did not demand a hearing, defendant's request for a hearing at this juncture was denied. The court then denied the motion on its merits.

In denying the motion, Judge Denato found that counsel appointed by Judge Hanrahan were competent, a quality which, in Judge Denato's opinion, included the ability to remain unaffected by pressure and publicity. The court rejected defendant's suggestion that local co-counsel could provide for the orderly disposition of pre-trial matters, reasoning that those matters are often critical to the defense and ought to be the responsibility of chief trial counsel. Further, Judge Denato noted that Mr. Otis "would be involved in trial in California well into May," which would be an impediment to the speedy disposition of the case. Trial court noted that it had not been established, at the time of the ruling on the original application, that Mr. Otis would serve for local fees only, without charging for travel time, but did not rely on this fact. Finally, the court referred to the plan for appointing criminal defense counsel in Polk County and pointed out that Mr. Otis was not on the appointment list.

Defendant now presents four arguments which he insists support at least a qualified right on the part of indigent criminal defendants to choose particular counsel to represent them. The first is based on the sixth amendment and *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The second is an equal protection argument. The third is based on due process, which also supports his claim that he was entitled to a hearing on the question. His final argument arises out of the language of section 775.4, which provides for appointment of counsel for indigents.

[1.2] While there is an absolute right to counsel, no defendant, indigent or otherwise, has an absolute right to be represented by a particular lawyer. See, e.g., *United States v. Vargas-Martinez*, 569 F.2d 1102, 1104 (9th Cir. 1978); *United*

States v. Poulack, 556 F.2d 83, 86 (1st Cir.), *cert. denied*, 434 U.S. 986, 98 S.Ct. 613, 54 L.Ed.2d 480 (1977); *United States v. Dinitz*, 538 F.2d 1214, 1219 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104, 97 S.Ct. 1133, 51 L.Ed.2d 556 (1977); *cf. United States v. Buttorff*, 572 F.2d 619, 627 (8th Cir.), *cert. denied*, 437 U.S. 906, 98 S.Ct. 3095, 57 L.Ed.2d 1136 (1978); *United States v. Hinderman*, 528 F.2d 100, 102-03 (8th Cir. 1976) (no right to representation by laymen). A defendant's right to choose particular counsel is circumscribed by trial court discretion, which may be exercised to effectuate an orderly disposition of the case. *United States v. Dinitz*, 538 F.2d at 1219; *Harling v. United States*, 387 A.2d 1101, 1104 (D.C. 1978). Thus, trial courts have generally been vested with broad discretion in determining the particular attorney to be appointed to represent an indigent defendant. *See, e. g., Drumgo v. Superior Court*, 8 Cal.3d 930, 106 CalRptr. 631, 506 P.2d 1007 (1973); *Baker v. Commonwealth*, 574 S.W.2d 325, 326-27 (Ky.Ct.App.1978); *State v. Hollins*, 512 S.W.2d 835, 838 (Mo.Ct.App. 1974); *People v. Medina*, 44 N.Y.2d 199, 207, 404 N.Y.S.2d 588, 592-93, 375 N.E.2d 768, 772 (1978); *Commonwealth v. Chumley*, 482 Pa. 626, 646 n.3, 394 A.2d 497, 507 (1978), *cert. denied*, 440 U.S. 966, 99 S.Ct. 1515, 59 L.Ed.2d 781 (1979); *Brewer v. State*, 4 Tenn.Ct.Cr.App. 265, 270, 470 S.W.2d 47, 49 (1970); *Watson v. Black*, 239 S.E.2d 664, 668 (W.Va.1977); *State v. Shears*, 68 Wis. 2d 217, 259-60, 229 N.W.2d 103, 124 (1975); *Irvin v. State*, 584 P.2d 1068, 1070 (Wyo. 1978). *See generally* Annot., 66 A.L.R.3d 996 (1975). In fact, that discretion has been interpreted to encompass the adoption of policies which specifically preclude the defendant from selecting his lawyer. *United States v. Davis*, 604 F.2d 474, at 478-479 (7th Cir. 1979).

[3,4] Because we are impressed by the overwhelming support for the rule, we hold that trial courts have broad discretion, both in the first instance, and in considering a motion for substitution of counsel, in choosing the particular lawyer to represent an indigent defendant. The concerns stated by both

district judges in this case regarding the need for local counsel to deal effectively and promptly with pre-trial matters are reasons sufficient to characterize their actions as being well within the boundaries of sound discretion.

[5] Defendant's specific arguments remain to be answered. His first, based on the sixth amendment, is summarized by this passage from his brief:

In *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the Court recognized that the right to counsel was a *personal* right that included the right to proceed *without* an attorney in a criminal case. Surely if the defendant has the right to choose to represent himself despite the serious practical problems this might cause at trial, he also has the right to choose to have a particular attorney represent him, . . .

This argument entirely ignores the basis of *Faretta*. The Court found in that case that the right to proceed without counsel was an *independent* right See 422 U.S. at 819 n.15, 95 S.Ct. at 2533, 45 L.Ed.2d at 572. Because the source of the right of self-representation in the sixth amendment is independent of the right to self-representation does not imply a right to choice of particular counsel. *United States v. Dolan*, 570 F.2d 1177, 1183 (3d Cir. 1978).

[6] The equal protection claim is without merit because the right to choice of counsel by both indigent and non-indigent defendants is limited by trial court discretion to maintain an orderly trial process. Trial court, in both rulings, placed reasonable reliance upon such a ground in denying defendant's request for Mr. Otis.

[7] Defendant next claims that due process gives him both the right to choose his counsel and the right to a hearing on the matter. No authority is cited for the proposition that a substantive independent right of choice of counsel is a component of due

process. Nor is any likely to be found. Rather, such a qualified due process right may exist by incorporation of the right to counsel established by the sixth amendment. And, insofar as that is true, defendant's contention has already been answered.

[8] Nor does the claim that due process gave defendant a right to a hearing on this matter have merit. First, it is doubtful that defendant has established an entitlement to a choice of particular counsel. In the absence of such an entitlement, the state is not required to give him procedural due process. *Leis v. Flynt*, 439 U.S. 438, 442, 99 S.Ct. 698, 701, 58 L.Ed.2d 717, 723 (1979)(per curiam).

Moreover, the facts of this case do not show any need for a hearing. None of the facts alleged in the application or the motion were controverted. Both judges appear to have accepted those facts as established.¹ The application did not request a hearing, although such a request was required by the local rules. The rulings both indicated that each judge conferred with Mr. Bartels, who had prepared both the application and the motion. In addition, defendant submitted a brief in support of his motion for substitution. Finally, defendant gives no suggestion or hint as to what further benefit he might have gained by a formal hearing. While it would have been preferable to grant defendant a hearing when it was requested, if for no other reason than to enable the court to exercise a fully informed discretion, failure to do so on the facts of this case did not deny defendant due process.

¹As we have noted, Judge Denato did rule that it had not been established at the time of the ruling on the first application that Mr. Otis would serve for local fees only. That matter, however, was not mentioned by either judge as a factor in the exercise of discretion and Judge Denato specifically discounted its importance.

[9] The fourth ground upon which defendant seeks to base his right to a choice of counsel is the text of section 775.4.² He argues that because the "allow him to select" language is the first alternative listed, it ought to be preferred. The statute establishes in the trial court the power to appoint counsel by either of two alternative means. We find no stated preference in the statute for either alternative. Trial court exercised its discretion by selecting one of the two listed methods. Its selection was not an abuse of that discretion.

II. *Use of the inevitable discovery doctrine.* In the second division of his brief Williams addresses the issue of whether trial court should have suppressed evidence relating to the body of the murder victim, including clothing found on the body and results of tests performed on the body. His argument is that suppression was required because the evidence was the "fruit of the poisonous tree." That is, the body was discovered as a result of statements by defendant which the police obtained in an unlawful manner. The State answers this contention by arguing that the search which was under way for the victim would have discovered the body in any event, even absent defendant's assistance.

[10] Thus, this case squarely presents the question of whether the doctrine of inevitable discovery, more accurately referred to

² **775.4 Right to counsel.** If the defendant appears for arraignment without counsel, he must, before proceeding therewith, be informed by the court of his right thereto, and be asked if he desires counsel; and if he does, and is unable to employ any, the court must allow him to select or assign him counsel, not exceeding two, who shall have free access to him at all reasonable hours.

as the hypothetical independent source rule,³ is a constitutionally permissible exception to the exclusionary rule. Encompassed in that broad question are inquiries into the precise boundaries and requirements of the rule, and into the adequacy of the factual showing made by the State for invocation of the doctrine here.

[11] Because the police used unlawful methods to obtain defendant's assistance in recovering the body of Pamela Powers, the fact of his assistance and his statements must be suppressed. *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). It has long been the rule that evidence which is derived from such unlawfully gained statements must also be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). The Supreme Court has recognized two exceptions to this rule. The first, stated in *Silverthorne* itself, is that the Government may use such derivative evidence if knowledge of it was gained from an independent source. 251 U.S. at 392, 40 S.Ct. at 183, 64 L.Ed. at 321. The second, first recognized in *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307, 312 (1939), and more fully developed in later cases,⁴ allows use of

³ As we shall explain, the rule is an extension of the independent source exception to the rule of exclusion found in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). And the word "inevitable" overstates the actual second requirement of the rule, which is that the State show by a preponderance of the evidence that the disputed evidence would have been found without the constitutional violation. Nevertheless, because of the overwhelming use of the phrase "inevitable discovery" by other courts and commentators, we accede to that usage.

⁴ *United States v. Ceccolini*, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978); *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972); *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

such evidence whenever the connection between the primary illegality and the derivative evidence sought to be introduced has been so sufficiently attenuated that the taint is dissipated. The inevitable discovery rule which the State here proposes has never been recognized by the Supreme Court as a third exception to the *Silverthorne* rule.¹ That Court has declined the opportunity to consider the rule's constitutionality on several occasions. See, e. g., *Fitzpatrick v. New York*, 414 U.S. 1050, 1051, 94 S.Ct. 554, 555, 38 L.Ed.2d 338, 339 (1973) (White, J., dissenting from denial of certiorari); Note, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 Colum.L.Rev. 88, 91 n.22 (1974) [hereinafter cited as Columbia Note]. This, however, may change in the near future. See *United States v. Crews*, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979) (granting certiorari to review *Crews v. United States*, 389 A.2d 277 (D.C.1978) (en banc), which rejected the rule, *id.* at 291-95, and reversed an armed robbery conviction). It was the subject of comment in *Brewer v. Williams*, 430 U.S. at 406 n.12, 97 S.Ct. at 1243, 51 L.Ed.2d at 441. For the moment, however, we are left to consider for ourselves the constitutional propriety of the inevitable discovery doctrine. We may call to our aid in this task a substantial body of law from lower federal courts and the courts of other states. In addition, we have the benefit of the opinions of several commentators on this subject.

The hypothetical independent source exception to the rule of exclusion has the support of a "vast majority" of all the courts which have considered it. 3 W. LaFare, *Search and Seizure* § 11.4, at 622 (1978). This includes six of the United States Courts of Appeals. See *United States v. Schmidt*, 573 F.2d 1057, 1065 n.9 (9th Cir.) (alternative rationale), *cert. denied*, 439 U.S. 881, 99 S.Ct. 221, 58 L.Ed.2d 194 (1978); *United States v. Ceccolini*, 542 F.2d 136, 140-41 (2d Cir. 1976), *rev'd on other grounds*, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978); *Owens v. Twomey*, 508 F.2d 858, 865-66 (7th Cir. 1974) (alternative rationale); *Virgin Islands v. Gereau*, 502 F.2d 914, 927-28 (3d Cir. 1974), *cert. denied*, 420 U.S. 909, 95 S.Ct. 829, 42 L.Ed.2d 839

(1975); *United States v. Seohnlein*, 423 F.2d 1051, 1053 (4th Cir.)(alternative rationale), *cert. denied*, 399 U.S. 913, 90 S.Ct. 2215, 26 L.Ed.2d 570 (1970); *Wayne v. United States*, 115 U.S.App.D.C. 234, 238, 318 F.2d 205, 209 (D.C.Cir.), *cert. denied*, 375 U.S. 860, 84 S.Ct. 125, 11 L.Ed.2d 86 (1963); *cf. United States v. Melvin*, 596 F.2d 492, 500 (1st Cir. 1979). *But see United States v. Schipani*, 414 F.2d 1262, 1266 (2d Cir. 1969), *cert. denied*, 397 U.S. 922, 90 S.Ct. 902, 25 L.Ed.2d 102 (1970); *United States v. Paroutian*, 299 F.2d 486, 489 (2d Cir. 1962) (rejecting as inadequate the Government's claim that evidence "might" have been discovered independently). *See also Somer v. United States*, 138 F.2d 790, 792 (2d Cir. 1943)(Learned Hand, J.). And the state courts which have recently been confronted with the issue appear to be nearly unanimous in their recognition and approval of the rule. *See, e. g., State v. Tillery*, 107 Ariz. 34, 39, 481 P.2d 271, 276 (en banc), *cert. denied*, 404 U.S. 847, 92 S.Ct. 151, 30 L.Ed.2d 84 (1971); *State v. Washington*, 120 Ariz. 229, 231, 585 P.2d 249, 251 (Ct.App.1978)(reciting but not applying inevitable discovery); *Lockridge v. Superior Court*, 3 Cal.3d 166, 170, 89 Cal. Rptr. 731, 734, 474 P.2d 683, 686 (1970), *cert. denied*, 402 U.S. 910, 91 S.Ct. 1387, 28 L.Ed.2d 652 (1971); *People v. Emanuel*, 87 Cal.App.3d 205, 214, 151 Cal.Rptr. 44, 50 (1978); *Sheff v. State*, 301 So.2d 13, 18 (Fla.Dist.Ct.App.1974), *aff'd on other grounds*, 329 So.2d 270 (1976); *People v. Pearson*, 67 Ill.App.3d 300, 308-10, 24 Ill. Dec. 173, 179-80, 384 N.E.2d 1331, 1337-38 (1978); *People v. Moore*, 55 Ill.App.3d 706, 711-12, 13 Ill.Dec. 499, 502-03, 371 N.E.2d 194, 197-98 (1977), *aff'd on other grounds*, 61 Ill.App.3d 694, 19 Ill.Dec. 15, 378 N.E.2d 516 (1978); *Leuschner v. State*, 41 Md.App. 423, 428, 397 A.2d 622, 626 (1979); *People v. Tucker*, 19 Mich.App. 320, 328-30, 172 N.W.2d 712, 717-18 (1969), *aff'd*, 385 Mich. 594, 189 N.W.2d 290 (1971), *acq. in result Michigan v. Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974); *People v. Payton*, 45 N.Y.2d 300, 313-14, 408 N.Y.S.2d 395, 401-02, 380 N.E.2d 224, 230-31 (1978), *forma pauperis granted & probable*

jurisdiction noted, 439 U.S. 1044, 99 S.Ct. 718, 58 L.Ed.2d 703 (1978); *People v. Fitzpatrick*, 32 N.Y.2d 499, 506-08, 346 N.Y.S.2d 793, 797-98, 300 N.E.2d 139, 141-42, *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973); *State v. McKendall*, 36 Or.App. 187, 192, 584 P.2d 316, 320 (1978) (applying inevitable discovery test codified in Or.Rev.Stat. § 133.683 (1977)); *Commonwealth v. Wideman*, 478 Pa. 102, 105, 385 A.2d 1334, 1336 (1978); *Ex parte Parker*, 485 S.W.2d 585, 589 (Tex.Cr.App.1972). See also *People v. Kusowski*, 403 Mich. 653, 662, 272 N.W.2d 503, 506 (1978) (separate opinion); Annot., 43 A.L.R.3d 385, 404-06 (1972); cf. *State v. Sickels*, 275 N.W.2d 809, 814 (Minn.1979).

Three appellate courts have clearly rejected the rule. *United States v. Houlton*, 525 F.2d 943, 949 (5th Cir.), *rehearing denied*, 533 F.2d 1135 (5th Cir. 1976) *vacated in part on other grounds mem. sub nom., Croucher v. United States*, 429 U.S. 1034, 97 S.Ct. 725, 50 L.Ed.2d 745 (1977); *Parker v. Estelle*, 498 F.2d 625, 629 n.12 (5th Cir.), *rehearing denied*, 503 F.2d 567 (5th Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450 (1975); *United States v. Castellana*, 488 F.2d 65, 68, *modified on other grounds en banc*, 500 F.2d 325 (5th Cir. 1974); *United States v. Peurifoy*, 22 C.M.A. 549, 552, 48 C.M.R. 34, 37 (1973); *Crews v. United States*, 389 A.2d 277, 291-95 (D.C.1978) (*en banc*), *cert. granted*, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979); see *United States v. Massey*, 437 F.Supp. 843, 853 n.3 (M.D.Fla.1977). But see *Gissendanner v. Wainwright*, 482 F.2d 1293, 1297 (5th Cir. 1973). And one other court has published an opinion which might be read either as an absolute rejection of the rule, or as a refusal to apply the rule to the facts of that case. *United States v. Griffin*, 502 F.2d 959, 960-61 (6th Cir.) (*per curiam*), *cert. denied*, 419 U.S. 1050, 95 S.Ct. 626, 42 L.Ed.2d 645 (1974).

Two courts have held that the facts of the particular cases before them would not support application of the rule, and have reserved the issue for a proper case. *United States v. Kelly*, 547

F.2d 82, 86 (8th Cir. 1977); *State v. Ercolano*, 79 N.J. 25, 35-36, 397 A.2d 1062, 1067 (1979). It is interesting to note, however, that *Kelly* makes no mention of *United States v. DeMarce*, 513 F.2d 755, 758 (8th Cir. 1975), which appeared to make use of the doctrine without discussion. And at least one lower court in New Jersey has referred to inevitable discovery approvingly. *State v. Mather*, 147 N.J.Super. 522, 526-28, 371 A.2d 758, 761-62 (1977).

The commentators split more evenly on the constitutionality of the inevitable discovery doctrine. Compare 3 W. LaFave, *supra* § 11.4, at 620-28; LaCount & Girese, *The "Inevitable Discovery" Rule, An Evolving Exception To The Constitutional Exclusionary Rule*, 40 Alb.L.Rev. 483 (1976); Maguire, *How To Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J.Crim.L.C. & P.S. 307 (1964) (all approving the rule), with Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 Calif.L.Rev. 579, 629-30 (1968); Comment, *Fruit of the Poisonous Tree: Recent Developments As Viewed Through its Exceptions*, 31 U.Miami L.Rev. 615, 626-29 (1977); Columbia Note, *supra* at 99-101; Comment, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U.Pa.L.Rev. 1136, 1142-47 (1967) [hereinafter cited as Pa.Comment] (all criticizing the doctrine). See also Model Code of Pre-Arrest Procedure § 290.2(5) (Proposed Official Draft, 1975) (proposing a codified version of the rule).

[12,13] On consideration of these authorities, we have determined that the position espoused by Professor LaFave is the one which conforms to the mandates of the Federal Constitution. Professor LaFave would have courts permit the use of inevitable discovery as an exception to the exclusionary rule when the State has met a two part test. First, use of the doctrine should be permitted only when the police have not acted in bad faith to accelerate the discovery of the evidence in question. Second, the State must prove that the evidence would have been found without the unlawful activity and how that discovery

would have occurred. Courts must use extreme caution to avoid applying the rule on the basis of hunch or speculation. We adopt this rule because it fits with the rationale of the two better established exceptions to the exclusionary rule, and because it meets the two most substantial complaints which are generally made by opponents of the inevitable discovery doctrine.

Although the inevitable discovery rule is probably best viewed as an expansion of the independent source exception which allows substitution of a hypothetical source for an actual one, 3 W. LaFave, *supra* § 11.4, at 620-21, Columbia Note, *supra* at 90, a better understanding of it can also be gained by examination of the history of the attenuation exception. In laying the groundwork for establishing the attenuation test in *Nardone*, Justice Frankfurter recognized that "[a]ny claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped." 308 U.S. at 340, 60 S.Ct. at 267, 84 L.Ed. at 311. He observed two concerns which must be harmonized: "the stern enforcement of the criminal law" and the protection of the individual against governmental infringement on rights guaranteed by the Constitution.³ *Id.* The Court sought to give effect to each of these competing interests by the application of the attenuation exception, which was referred to as "a matter of good sense." *Id.* at 341, 60 S.Ct. at 268, 84 L.Ed. at 312. So it is here as well. Those who argue against the inevitable discovery rule have failed to overcome the "heavy handicap" in their campaign to exclude relevant evidence. The rule is a "good sense" solution to the problem of balancing the interests involved. See Columbia Note, *supra* at 99 ("exception does make a certain pragmatic sense").

³ In this case we are concerned with protection of the sixth amendment right to counsel. *Brewer v. Williams*, 430 U.S. at 398, 97 S.Ct. at 1239, 51 L.Ed.2d at 436.

Another helpful piece of attenuation history is found in *Wong Sun*, where the Court rejected a "but for" test. That is, the Court refused to "hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." 371 U.S. at 487-88, 83 S.Ct. at 417, 9 L.Ed.2d at 455. The Seventh Circuit found from the quoted language and that which immediately followed that *Wong Sun* established the inevitable discovery rule. *Twomey*, 508 F.2d at 865-66. While we cannot agree that *Wong Sun* goes so far, *Wong Sun* is certainly consistent with, and poses no obstacle to, the adoption of an inevitable discovery test such as the one we have proposed. That which we find in *Wong Sun* is a justification for the inevitable discovery rule's lack of amenability to a mechanical application.

As already suggested, the version of the rule which we adopt also meets two of the most regularly heard complaints against the inevitable discovery rule. The first of these is that its use will defeat the purposes of the exclusionary rule. See, e. g., *Crews*, 389 A.2d at 293.

In *Brown v. Illinois*, 422 U.S. 590, 599-600, 95 S.Ct. 2254, 2259-60, 45 L.Ed.2d 416, 424-25 (1975), the Court recited the two regularly recognized purposes of the exclusionary rule: deterrence of lawless conduct by the police and protection of judicial integrity.* The opponents of the inevitable discovery doctrine claim that it frustrates the deterrence purpose by sanctioning "end runs and shortcuts." *Crews*, 389 A.2d at 293-94; *Castellana*, 488 F.2d at 68; Pa. Comment, *supra* at 1143. The fear seems to be that the police will proceed in an unlawful manner to hasten discovery of evidence on the assumption that it will be possible to persuade a judge at a later date that the evidence would have been found by lawful means in any event.

* Of course, judicial integrity is not enhanced by an overzealous exclusion of relevant evidence.

[14] The answer to this objection is to include as an element of the inevitable discovery exception a requirement that the prosecution show that the police did not act in bad faith to hasten discovery of the questioned evidence. *Cf. Brown v. Illinois*, 422 U.S. at 605, 95 S.Ct. at 2262, 45 L.Ed.2d at 428 (referring to "purposefulness" of illegal police conduct). Obviously, bad faith means something more than just acting unlawfully, for if the police action was lawful the issue would never have arisen in the first place. And the question of bad faith may require different treatment, depending upon the nature of the lawless action taken by the police. That is, the initial unlawful activity might, for example, be a violation of either the fourth, the fifth or the sixth amendments. Police action taken solely to avoid the warrant clause of the fourth amendment, see *United States v. Griffin*, 502 F.2d at 960-61, discussed approvingly in 3 W. LaFave, *supra* § 11.4, at 624, might well provide a clear-cut case for refusal to apply the inevitable discovery exception. In such a situation the application of inevitable discovery would result in deletion of the warrant clause from the fourth amendment because that clause's sole purpose is to insert a magistrate between the proposed subject of a search and police officers who assert probable cause for the search. See, e. g., *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436, 440 (1948). By this discussion we do not mean to intimate that violations of the fourth amendment will receive any greater or lesser scrutiny than violations of other constitutional safeguards. Rather, we intend only to illustrate what we mean when we refer to bad faith on the part of the police.

The second objection to inevitable discovery is "the ambiguity, subjectivity, and consequent potential for abuse inherent in its application." *Crews*, 389 A.2d at 294. This objection, however, does not go to the exception itself, or the exception in the abstract. Rather, it is an expression of concern that the rule may be applied in a "loose and unthinking fashion." 3 W. LaFave, *supra* § 11.4, at 623. The answer to the objection lies in part in our statement of the rule, and in part in the manner in which questions of this kind are reviewed by the appellate courts of this state.

[15-17] In order to satisfy its burden, the State must show that the evidence *would* have been discovered. A showing that discovery *might* have occurred is entirely inadequate. Two points arise here. First, the State must show how the evidence would have been discovered. The precision required here will vary somewhat with the circumstances of the case. Situations in which the evidence was well hidden, or in which time would be a critical factor, would require a better showing on the part of the State as to exactly how or when discovery would have occurred. Second, a determination that a discovery would have come about must rest upon the record. Judges will not be permitted to supplement the record by reference to apparently similar cases in which evidence was discovered. *Commonwealth v. Wideman*, 478 Pa. at 107, 385 A.2d at 1337. This is not to deny the availability of judicial notice in appropriate cases, however.

The potential difficulties of ambiguity and subjectivity are also alleviated by the fact that the appellate courts of this state review such questions de novo. *State v. Ege*, 274 N.W.2d 350, 352 (Iowa 1979). Factual, as well as legal, determinations made by a single judge and questioned by one party or the other are open to full review by at least five persons of differing backgrounds and philosophies. A convergence of a majority of those viewpoints is good, and entirely adequate, protection against subjectivity and ambiguity.

[18] The defendant also argues that if the exception is recognized the State should be required to meet a clear and convincing standard of proof, rather than a mere preponderance. The great weight of case law, however, supports the proposition that after the defendant has shown police conduct which is unconstitutional, the burden shifts to the State to demonstrate, by a preponderance of the evidence, that one of the exceptions to the exclusionary rule applies. *Alderman v. United States*, 394 U.S. 165, 183, 89 S.Ct. 961, 972, 22 L.Ed.2d 176, 192 (1969); *United States v. Falley*, 489 F.2d 33, 41 (2d Cir. 1973); cf. *United States v. Matlock*, 415 U.S. 164, 177 n.14, 94 S.Ct. 988,

996, 39 L.Ed.2d 242, 253 (1974) (general statement regarding all suppression hearings); *Lego v. Twomey*, 404 U.S. 477, 486-87, 92 S.Ct. 619, 625-26, 30 L.Ed.2d 618, 626 (1972) (*Miranda* violation). On the basis of these authorities, we hold that the State's burden is met by a preponderance of the evidence.

In summary, then, we hold that the inevitable discovery rule is a constitutionally sound exception to the rule of exclusion first propounded in *Silverthorne*. After the defendant has shown unlawful conduct on the part of the police, the State has the burden to show by a preponderance of the evidence that (1) the police did not act in bad faith for the purpose of hastening discovery of the evidence in question, and (2) that the evidence in question would have been discovered by lawful means. This second element may require greater or lesser precision in showing the manner or time of discovery depending upon the circumstances of the case.

We now proceed to examine the facts of this case in the light of the standard just stated. Defendant has, of course, met his burden to show unconstitutional police conduct. That was established by the Supreme Court in *Brewer v. Williams*.

[19] The first question, then, is whether the police acted in bad faith for the purpose of hastening discovery of the body of Pamela Powers. While there can be no doubt that the method upon which the police embarked in order to gain Williams's assistance was both subtly coercive and purposeful, and that its purpose was to discover the victim's body, see 430 U.S. at 393, 399, 97 S.Ct. at 1236-37, 1240, 51 L.Ed.2d at 433, 437, we cannot find that it was in bad faith. The issue of the propriety of the police conduct in this case, as noted earlier in this opinion, has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.

Thus we proceed to consider the facts bearing on the second question: whether a preponderance of the evidence indicates that the body of Pamela Powers would have been found by lawful means, without the unlawfully obtained assistance of defendant.

On December 24, 1968, the family of Pamela Powers attended a wrestling tournament held at the YMCA in Des Moines. Pamela excused herself to go wash her hands before eating a candy bar. No one has been willing to acknowledge having seen her alive since.

Shortly after the disappearance of the Powers girl, and after a search for her had begun, defendant left the YMCA carrying a bundle which, observers later concluded, contained the body of Pamela Powers. Observers also obtained the license number of the green 1959 Buick in which he departed.

On December 25, two discoveries were made which gave some indication of the direction and route of defendant's flight from Des Moines. First, the car which he drove from the YMCA was discovered in Davenport, Iowa, which is located several hours east of Des Moines on Interstate 80. Later several items of clothing belonging to the victim, some clothing belonging to defendant, and an army blanket like that used to wrap the bundle which Williams carried out of the YMCA were found at a rest stop on Interstate 80 near Grinnell, between Des Moines and Davenport.

Police officials concluded that the items of clothing found at the Grinnell rest stop were probably among the last items to be taken from the Powers girl. They therefore came to the belief that Pamela Powers would be found somewhere in the Grinnell area, or west of Grinnell, in the direction of Des Moines. They also formed the opinion that she was probably somewhere near Interstate 80.

On that basis, a search was initiated on the 26th of December. Maps of Poweshiek and Jasper Counties were obtained. Grinnell is in Poweshiek County. Jasper County lies directly west of Poweshiek County. Polk County, in which Des Moines is located, lies directly west of Jasper County. Interstate 80 divides both Jasper and Poweshiek Counties into nearly perfect north and south halves.

On the two county maps, the Bureau of Criminal Investigation agent in charge of the search drew a grid pattern encompassing an area from roughly seven miles north of Interstate 80 to seven miles south of Interstate 80. The search thus began at the eastern border of Poweshiek County, twenty-one miles east of Grinnell, and moved westward. Teams of from four to six volunteers were each assigned to search an area on the gridded maps. Searchers were instructed to check all roads and ditches. While ditches were to be inspected from the road, searchers were told to get down and look into culverts. They were also instructed to search abandoned farm buildings and any other places where a small child could be secreted.

The agent in charge of the search testified at the suppression hearing that he had received reports that the searchers were following their instructions. This included getting down into ditches to look into culverts.

The search was called off at 3:00 p. m., when the BCI agents directing the volunteer searchers were told to meet Captain Leaming of the Des Moines Police Department at the truck stop near Grinnell. The cancellation was ordered because no officers remained to direct the search. In response to questions by the trial judge, the officer in charge of the search stated that he was "under the impression that there was a possibility that we could be led to the body at that time."

When the search ended at 3:00 p. m., it had been carried to the western edge of Jasper County, that is, the Jasper County-Polk County line. It was never resumed because defendant led

the police to the body of Pamela Powers. That body was in Polk County, two and one-half miles west of the Jasper County line. It rested next to a culvert in a ditch beside a gravel road which was about two miles south of Interstate 80.

The agent in charge of the search testified that had the body not been found by other means, the search would have continued west into Polk County, and that, in his opinion, the body would have been found within three to five hours after the search crossed the Jasper County-Polk County line.

It is not entirely clear, as defendant points out, when the search would have been reinitiated. It is clear, however, that the search would have proceeded into Polk County. We may infer from the testimony that it would have continued without hesitation, had the officers in charge not been called away. And, even after the interruption, the search would have begun again, although the precise time is not clear.

In light of the other facts, however, the precise time at which the search would have covered the area in which Pamela Powers's body lay was not of critical importance. The State produced an expert who testified that, based on the records of temperature from the month of December 1968 through the month of April 1969, the body of Pamela Powers would have been preserved in the state in which it was actually found until April of 1969. The only suggestion to the contrary came from testimony that the body had been disturbed by animals. This aspect, however, was not pursued at any length in the suppression hearing. Further, damage of that kind after nearly two days of exposure was minimal, suggesting that another two days, for instance, would have had little effect.

The State also introduced photographs showing the body as it was actually found. Those photographs show that Pamela Powers's body would not have been hidden by the inch of snow which accumulated in the area on the evening of December 26. The body was dressed in an orange and white striped blouse,

which is what the officer who discovered the body saw first. In addition, the left leg of the body was poised in midair, where it would not have been readily covered by a subsequent snowfall.

It is true, as defendant argues, that Captain Leaming testified at the first trial that it took officers about five minutes to discover the body after Williams led them to the proper vicinity. While those officers did search on foot, Captain Leaming did not testify that any of them actually went down into the ditch.

[20] Our review of the evidence leads to the conclusion that persons conducting a search such as the one which was conducted in Poweshiek and Jasper Counties and which was to be continued into Polk County would have found the body of Pamela Powers. Her body was frozen to the side of a cement culvert. It would have been nearly impossible for anyone who came down into the ditch to look into the culvert, as the searchers were doing, to fail to see the child's body. We thus conclude that as a result of the search which was underway, and which would have been continued, the body of Pamela Powers would have been found even in the absence of assistance by defendant. Further, that body would have been found in essentially the same condition it was in at the time of the actual discovery, so that all of the evidence which it actually yielded would have been available to the police.

Under the evidence adduced in this case, the State established by a preponderance of the evidence the manner and the time in which the discovery of Pamela Powers's body would have occurred. Trial court was correct in refusing to suppress evidence regarding the victim's body.

III. *Refusal to suppress evidence from car.* Defendant's next contention is that trial court erred in refusing to suppress evidence obtained in a search of the car which he used to transport himself to Davenport. His contention is that the search was improper because the magistrate who issued the search warrant did not endorse on the application the name of

the police officer who appeared and gave sworn testimony in support of the warrant, and did not include an abstract of that officers' testimony.

The parties are agreed that the affidavit which accompanied the application for search warrant was insufficient because it contained nothing except conclusory allegations. And the parties agree that the information which the police officer testified at the suppression hearing that he had given to the issuing magistrate in his sworn statement would have provided probable cause for issuance of the warrant.

[21] The issue, then, is whether the court hearing the motion to suppress could properly consider the oral testimony given to the magistrate, or if consideration of that testimony was foreclosed by the magistrate's failure to make an abstract of the oral statement.

The statutory provision which made such an abstract a requirement when oral testimony was relied upon to issue a warrant, an amendment to section 751.4, The Code 1966 (current version at § 808.3, The Code 1979), did not take effect until six months after the warrant in question was issued. But defendant contends that *State v. Spier*, 173 N.W.2d 854, 862 (Iowa 1970), relying upon *State v. Lampson*, 260 Iowa 806, 149 N.W.2d 116 (1967), made such an abstract a requirement prior to the effective date of the amendment to section 751.4, including the period during which the present warrant was issued. We reject this contention because *State v. Spier* was decided upon a lack of probable cause for the issuance of the search warrant. It did not turn upon whether oral testimony was endorsed on the warrant application. Nor did it rely upon *State v. Lampson* for the endorsement requirement.

Spier and *Lampson* both dealt with what is required to show probable cause when the police officer applying for the warrant is relying upon an informant. In *Lampson* the applying officer presented the magistrate with an oral statement which was

essential to the warrant's issuance. 260 Iowa at 808-09, 812, 149 N.W.2d at 117, 119. There is no indication in the opinion that the magistrate abstracted that statement. Certainly, that was not an issue in the case.

In *Spier*, this court relied upon *Lampson* for the proposition that a warrant may be issued on sworn testimony taken by the magistrate. 173 N.W.2d at 862. But *Spier* then went beyond *Lampson* to state a requirement that the magistrate make a written abstract of such testimony, and, if an informant is being relied upon, an abstract of the information showing that informant's reliability. This language, which served as a prelude to the holding that an abstract was required, clearly demonstrates that this court understood that the abstracting requirement was an addition to those of *Lampson*: "While reaffirming our stand in *Lampson*, *supra*, it is to us now apparent . . ." (Emphasis added.)

No decision of this court has held the abstracting requirements of *Spier* to apply to a case which arose before the effective date of the amendment to section 751.4. Although the facts in *Spier* arose prior to that amendment, the standards which *Spier* sets out appear, in fact, to be *dicta* provided for the guidance of persons who would be required to operate under the requirements of the amendment to section 751.4. No other justification for the standard exists. No such requirement is imposed by the Constitution. *Campbell v. Minnesota*, 487 F.2d 1, 5 (8th Cir. 1973); *United States v. Berkus*, 428 F.2d 1148, 1152 (8th Cir. 1970). Because the statute upon which the *Spier* standard was based did not take effect until six months after the warrant in question was issued, defendant's contention is without merit.

[22] However, even if we were to assume that the *Spier* standard had some basis independent of the statute, we would decline to apply the holding of that case retroactively. The reliance of police officers on the state of the law as it stood in

December 1968 was reasonable, and such a retroactive application would have a seriously derogatory effect on the administration of justice. *See Johnson v. New Jersey*, 384 U.S. 719, 727, 86 S.Ct. 1772, 1777-78, 16 L.Ed.2d 882, 888 (1966). Trial court's refusal to suppress evidence gained in the search of defendant's car was proper.

IV. *Publicity during trial.* The fourth division of defendant's brief raises two separate but related points. Both focus on the claim that the jury was exposed to publicity about the case during the trial.

A. The first point is an assertion that trial court committed error by refusing to sequester the jury during the entire trial, or, alternatively during its deliberations.

The defense made a motion well in advance of trial which recited that the case had been the subject of a great deal of publicity. It therefore requested three items of relief: change of venue, individual voir dire examinations of each potential juror, and sequestration of the jurors "from the point of selection forward." Trial court granted a change of venue and individual voir dire, but subsequently refused to sequester the jury. The court recited three reasons for that refusal. First, voir dire, and particularly individual voir dire, would enable the parties to select an impartial jury. Then, recognizing that sequestration of the jury during trial would be for the purpose of shielding it from publicity during the trial, the court opined that a jury which was impartial initially could be expected to remain so throughout the trial. Second, the trial was anticipated to run for as long as two weeks. That length of isolation "would reduce drastically the number of people who [could] fairly be expected to serve" Third, the court expressed concern and reservations about the potential effect of extended isolation on jurors and their ability to maintain their "common sense of balance," which is essential to the jury system.

At the end of the first day during which evidence was presented, trial court denied, "at this stage in the record," another motion, in which defendant requested that the jury be sequestered during its deliberations. The court expressed the view that voir dire had shown that the jurors appeared to have minds of their own on the case, that they appeared to be resolved to try the case on the evidence, and that there was no indication that they would violate their oaths.

Finally, during a recess near the end of defendant's presentation of his case, defendant again moved for sequestration during deliberations. In support, defense counsel recited the fact that newspapers in both Cedar Rapids and Des Moines had published the names of the jurors, in spite of a request by trial court that the list not be published. In addition, two wire services had carried the jury list. On that basis, the defense argued that the possibility of jurors' being improperly contacted was greatly increased.

The State, for the first time, opposed the motion to sequester. In answer to defendant's latter contention, it argued that because the jury was in public view while hearing the case, it had already been exposed to persons who were inclined to contact them. Additionally, the State argued that sequestration was for the distinct purpose of keeping jurors from seeing publicity about the case.

Trial court again denied the request. The court reminded counsel that in admonishing the jurors it had instructed them to report any improper attempts at contacting them. It also held open the possibility of making special inquiry of the jury as to whether any such contact had occurred.

On appeal, defendant contends that these three rulings by the trial court denied him the fair trial which he is guaranteed by the Federal Constitution. He places primary reliance on *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). Reliance upon *Sheppard* at this stage in the proceedings is misplaced, however.

In *Sheppard*, the Supreme Court ordered that a writ of habeas corpus issue in favor of an Ohio state prisoner whose trial had been permeated by overreaching on the part of the press. That writ issued after a federal district court had held an evidentiary hearing which had produced five volumes of clippings from newspapers which had covered the case from the time of the crime through the trial to the time of conviction. *Sheppard v. Maxwell*, 231 F.Supp. 37, 44, 72 (S.D.Ohio 1964), *rev'd*, 346 F.2d 707 (6th Cir. 1965), *rev'd*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), *noted in id.* at 342, 86 S.Ct. at 1512, 16 L.Ed.2d at 608. In short, the Court had a full record upon which to base its conclusion that Sheppard had been denied a fair trial. In contrast to that full record, here we have nothing on which to base a judgment on such an issue.

We do not point up this difference to find fault in defendant's failure to produce such a record, at least with regard to the first motion. Obviously, the publicity from which a motion to sequester is designed to shelter the jury is publicity which occurs during trial. And, at the time of the first motion, defendant could not show such publicity without seeing into the future. The same is likely true of the second motion, because it was made so early in the trial process, and because it still had a view to the future: the deliberation period. But an evidentiary showing regarding publicity which had occurred during trial could have been made in conjunction with the third motion, and might have had some relevance regarding the likelihood of continued publicity during deliberations. Such a showing was never made.

Another way in which this case differs from *Sheppard* is that the Ohio trial court which originally tried Sheppard refused repeated motions for change of venue. 384 U.S. at 354 n.9, 86 S.Ct. at 1518, 16 L.Ed.2d at 615. This remedy for the effects of pre-trial publicity was granted here, although defendant later takes issue with the manner in which it was done.

For these reasons, we are not here confronted with the fair trial constitutional issue which defendant attempts to argue. Certainly, we are in no position to make an independent evaluation of the totality of the circumstances which *Sheppard* would require, 384 U.S. at 352, 362, 86 S.Ct. at 1517, 1522, 16 L.Ed.2d at 614, 620, and which defendant insists is appropriate. See also *State v. Jacoby*, 260 N.W.2d 828, 834 (Iowa 1977).

Instead, we can only review trial court's refusals to sequester the jury for an abuse of discretion. *State v. Lowder*, 256 Iowa 853, 864, 129 N.E.2d 11, 18 (1964), cert. denied, 380 U.S. 965, 85 S.Ct. 1110, 14 L.Ed.2d 155 (1965); § 780.19, The Code 1977 (current version at Iowa R.Crim.P. 18(5)(h)); *Dunahoo*, *The Scope of Judicial Discretion in the Iowa Criminal Law Process*, 58 Iowa L.Rev. 1023, 1066-67 (1973); see *State v. Johnson*, 216 N.W.2d 337, 339 (Iowa 1974); cf. *United States v. Carter*, 602 F.2d 799, 805 (7th Cir. 1979) (noting that most of the circuits allow the district court to permit separation of deliberating jury in the exercise of its discretion). Defendant argues in this regard that trial court gave only one reason for declining to sequester the jurors, and that the reason given was invalid as a matter of law, thus requiring a reversal. See *Farley v. Glanton*, 280 N.W.2d 411, 415 n.2 (Iowa 1979) (exercise of discretion based upon erroneous view of the law is error).

The contention is that trial court acted solely on the basis of avoiding inconvenience to jurors, and that this consideration was rejected in *Des Moines Register & Tribune v. Osmundson*, 248 N.W.2d 493, 500 (Iowa 1976). The argument has no merit for two reasons.

First, as our recitation of the facts shows, trial court listed several sound reasons for denying the motions.

[23] Second, and more important, the trial judge did not base his judgment on a consideration of juror convenience such as that referred to in *Osmundson*. Defendant's characterization of

trial court's comment that between one and two weeks of sequestration "would reduce drastically the number of people who can fairly be expected to serve . . ." as a reference to juror convenience is simply erroneous.

Trial courts have the discretion to excuse any juror for proper cause. *State v. Critelli*, 237 Iowa 1271, 1279-81, 24 N.W.2d 113, 117-18 (1947); § 607.3, The Code 1977. During voir dire, trial court's disposition of requests by veniremen that they be excused demonstrated that the court was not inclined to grant such excuses lightly. Reading the court's statement of reasons for denying the motion to sequester in the light of the court's later conduct at voir dire leads us to conclude that trial court feared that a substantially greater number of persons could demonstrate that they would be "materially injured," see § 607.3, by sequestration than by the time requirements of attending the trial itself and the subsequent deliberations.

No abuse of discretion was shown at this juncture.

B. Defendant also complains in this division because trial court denied defendant's motion in arrest of judgment without a hearing. That motion raised the constitutional fair trial issue which has been alluded to immediately above, and sought an evidentiary hearing on the matter. We do not consider the propriety of trial court's ruling or the failure to hold a hearing because that court's jurisdiction was extinguished before the ruling was issued.

The motion in arrest of judgment was filed on October 14, 1977. Three days later, on the 17th, defendant filed his notice of appeal. Trial court did not rule on the motion until October 24. Defendant subsequently filed a notice of appeal from the ruling on the motion in arrest on November 23, 1977.

[24,25] When defendant filed his notice of appeal on October 17 he cut off the jurisdiction of the district court to do anything except enforce the sentence if bail was not put in. *Cleesen v.*

Brewer, 201 N.W.2d 474, 476 (Iowa 1972). Although a ruling on a motion in arrest of judgment is appealable under some circumstances, *State v. Hellickson*, 162 N.W.2d 390, 393 (Iowa 1968), that rule applies only when trial court adjudicates the motion while it still has jurisdiction.

This case is different from *State v. Gatewood*, 179 N.W.2d 520 (Iowa 1970). In that case, this court reviewed a ruling on a motion in arrest of judgment which was filed after the notice of appeal because trial court had conducted a hearing on the motion and the merits of the issue could be litigated in any event in post-conviction relief proceedings. Here, of course, no hearing has been conducted. Thus nothing is to be gained by attempting to consider the matter in its present posture.

V. *Denial of motion for public opinion polls for use in selection of venue.* The fifth complaint which Williams makes is that he was denied effective assistance of counsel, due process and equal protection because trial court denied his request for funds to conduct public opinion polls in five Iowa counties other than Polk County. Those polls were to be for the purpose of selecting proper venue after trial court granted a change of venue.

[26] Defendant, however, overstates the problem. The question is whether trial court denied him the means to avoid being tried in a county where, because of the dissemination of potentially prejudicial material, there was a reasonable likelihood that he could not receive a fair trial. *Pollard v. District Court*, 200 N.W.2d 519, 520 (Iowa 1972) (quoting ABA Project on Standards for Criminal Justice, Fair Trial and Free Press § 3.2(c) (Approved Draft 1968)). Trial court did not so hinder him.

In fact, trial court granted a change of venue from Polk County to Linn County on the basis of potentially prejudicial publicity. If the same atmosphere had been shown to prevail in Linn County, it was open to defendant to petition for a second change of venue. *State v. Minski*, 7 Iowa 336 (1858). See also ABA Project on Standards for Criminal Justice, Fair Trial and

Free Press § 3.2(e) (Approved Draft 1968). While *Minski* engaged in statutory construction, its rationale applies to sections 778.1-.10, The Code 1977 (current version at Iowa R.Crim.P. 10.2(f), .9(b). Section 778.5 was not to the contrary.

This complaint is without merit.

VI *Denial of defendant's challenge for cause of prospective juror.* In this assignment, Williams insists that trial court erred by refusing to dismiss a juror who, defendant claims, showed she could not try the cause impartially. Defendant removed the prospective juror by use of his fourth peremptory challenges were exercised.

[27-30] We cannot base reversal on this assignment because the challenge was not sufficient to preserve any error. It did not specify the grounds upon which it was based. The full substance of it was: "we would challenge for cause. . . ." Under similar circumstances, this court held in *State v. Anderson*, 239 Iowa 1118, 1121-22, 33 N.W.2d 1, 3-4 (1948), that such a general statement did not entitle defendant to review of the question. This is in accord with the opening language of section 779.5, The Code 1977 (presently in Iowa R.Crim.P. 17(5)) ("A challenge for cause . . . must distinctly specify the facts constituting the causes thereof."), and a long line of case law. See, e. g., *Payne v. Waterloo, C. F. & N. Ry.*, 153 Iowa 445, 450, 133 N.W. 781, 783 (1911) (inference to be drawn from nature of examination of juror is not sufficient to preserve specific ground); *State v. Munchrath*, 78 Iowa 268, 270-71, 43 N.W. 211, 212 (1889). The failure to specify the cause prevents appellate consideration of both constitutional and statutory arguments. *State v. Jacoby*, 260 N.W.2d 828, 834 (Iowa 1977).

Even if the issue had been preserved, however, it is doubtful that reversal would have been mandated. Three principles govern our review of such questions. First, trial court is vested with broad, but not unlimited, discretion in ruling upon a challenge for cause. *State v. Winfrey*, 221 N.W.2d 269, 273

(Iowa 1974); *State v. Beckwith*, 242 Iowa 228, 232, 46 N.W.2d 20, 23 (1951); Dunahoo, *supra* at 1064-65. Second, a determination of a prospective juror's qualifications must rest upon the entire record of the examination. See *State v. Beckwith*, 242 Iowa at 238, 46 N.W.2d at 26. Third, the trial court sits as judge of the facts on the question of existence of a ground for challenge. *Tobin, Tobin & Tobin v. Budd*, 217 Iowa 904, 919, 251 N.W. 720, 727 (1934). Application of these principles to the ruling now questioned would not have been likely to lead to reversal. Trial court warned defense counsel that the use of leading questions in examining the prospective juror was minimizing the value of her answers. The court evidently believed that counsel, both for the State and for the defense, had confused her, and that defense counsel was leading her into the appearance of being disqualified. That finding has some support in the record.

This in no way marks a retreat from the position enunciated in *State v. Beckwith*, 242 Iowa at 238-39, 46 N.W.2d at 26. We reiterate that there is no need for close rulings on the qualifications of jurors in criminal cases. "[T]rial courts should use the utmost caution in overruling challenges for cause in criminal cases when there appears to be a fair question as to their soundness." *Id.* at 238, 46 N.W.2d at 26. See also Dunahoo, *supra* at 1065.

The contention considered here, however, does not require reversal.

VII. *Denial of defendant's motion for directed verdict on issues of premeditation and deliberation.* Defendant argues that there was not sufficient evidence to submit the issues of premeditation and deliberation, two of the elements which distinguish first degree murder from second degree murder. Our review of this issue is governed by *State v. Overstreet*, 243 N.W.2d 880, 883-84 (Iowa 1976), except that, as appellate counsel for defendant concede, circumstantial evidence is con-

sidered in light of the revised standard of *State v. O'Connell*, 275 N.W.2d 197, 204-05 (Iowa 1979). *State v. Hillsman*, 281 N.W.2d 114, 115 (Iowa 1979).

[31] "To deliberate is to weigh in one's mind or to consider. To premeditate is to think or ponder upon a matter before action. Webster's International Dictionary." *State v. Fryer*, 226 N.W.2d 36, 41 (Iowa 1975). See also W. LaFave & A. Scott, *Handbook on Criminal Law* § 73, at 563 (1972) ("Perhaps the best that can be said of 'deliberation' is that it requires a cool mind that is capable of reflection, and of 'premeditation' that it requires that the one with the cool mind did in fact reflect, at least for a short period of time before his act of killing.'). However, these elements need not exist for any particular length of time. *State v. Gilroy*, 199 N.W.2d 63, 66 (Iowa 1972).

[32-35] Premeditation and deliberation may not be presumed, *State v. Fryer*, 226 N.W.2d at 41, but because they are mental elements they may be shown by circumstantial evidence. *State v. Lass*, 228 N.W.2d 758, 766 (Iowa 1975); *State v. Christie*, 243 Iowa 1199, 1207, 53 N.W.2d 887, 891, modified, 54 N.W.2d 927 (1952); 40 C.J.S. *Homicide* § 192, at 1092 (1944). They may not be inferred from intent. *State v. Phillips*, 118 Iowa 660, 677, 92 N.W. 876, 881-82 (1902). And the mere opportunity to premeditate and deliberate is not enough. *State v. Wilson*, 234 Iowa 60, 94, 11 N.W.2d 737, 754 (1943) ("The question is not only, Did the accused have time to think, but did he think?"). Because premeditation and deliberation are elements of first degree murder, the State must prove them beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

When the State must rely upon circumstantial evidence of premeditation and deliberation, one or more of three categories of evidence frequently are used: "(1) evidence of planning activity of the defendant which was directed toward the killing; (2) evidence of motive which might be inferred from prior relation-

ships between defendant and the victim; and (3) evidence regarding the nature of the killing." *State v. Harrington*, 284 N.W.2d 244, 248 (Iowa 1979) (citing *People v. Anderson*, 70 Cal.2d 15, 26-27, 73 Cal.Rptr. 550, 557, 447 P.2d 942, 949 (1968) (en banc); W. LaFave & A. Scott, *supra* § 73, at 564). Adequate evidence to support both submission of the issue and a subsequent conviction might come either solely from one category or from more than one. *Harrington*, 284 N.W.2d at 248.

The evidence at trial established that the victim had been sexually molested at the time of, or immediately after, her death. It also indicated that her death was caused by "lack of oxygen and anoxia, probably induced by some smothering mechanism." In the opinion of the medical examiner, the suffocation was caused by external means, something which covered the victim's mouth and nose.

[36] Taking the evidence in the light most favorable to the State and drawing all fair inferences in favor of the jury's action, there was substantial evidence regarding the nature of the killing to justify submission to the jury of the issues of premeditation and deliberation. That panel would have been justified in concluding from the evidence that defendant apprehended Pamela Powers for the preconceived purpose of sexually molesting her, and that her death was a part of that coolly considered plan.

No error occurred here.

VIII. *Instructing on a theory which was not charged in the indictment.* Defendant was charged by an indictment which accused him "of the crime of murder as defined in Sections 690.1 and 690.2 of the 1966 Code of Iowa [in] that [defendant] . . . did with malice aforethought, premeditation, deliberation and intent to kill, murder Pamela Powers in Polk County, Iowa." He alleges that submission to the jury of a felony murder instruction containing the issue of whether Pamela Powers was killed

in the perpetration of an attempted rape was a violation of his statutory and constitutional rights to be tried only on the offenses charged in the indictment.

[37,38] Defendant first called this claimed error to trial court's attention in his motion for a new trial. An objection to an instruction may be urged in a motion for a new trial unless it has been expressly waived. *State v. Willis*, 250 N.W.2d 428, 430 (Iowa 1977) ("These are the only two objections to the instructions, Your Honor, that I did have," held to be such a waiver.). Here defendant did exactly that. First, defendant's objection to the felony murder instruction was founded only upon the ground of insufficient evidence to support submission of the issue; the objection did not question the propriety of submitting the issue under the indictment. Then, after dictating his objections, counsel stated: "I think with the exception of our proposed instructions, Your Honor, that's all we have with regard to any objections and exceptions to your proposed instructions." Thus, the error now urged was waived. *Id.* Defendant's assertion, first raised on appeal, that this claimed error deprived him of due process will not avail him. "This court does not address issues, even of constitutional magnitude, not presented to the district court." *Estabrook v. Iowa Civil Rights Commission*, 283 N.W.2d 306, 311 (Iowa 1979).

[39,40] In addition, we note that the federal constitutional argument which defendant makes in his initial brief is without merit. He there relies upon *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). But *Stirone* was based upon the fifth amendment guarantee against being held to answer for a federal felony "unless on a presentment or indictment of a Grand Jury." That provision of the Bill of Rights does not apply against the states. *Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884). And federal grand jury requirements are not imposed on states that choose to adopt grand jury systems. *Alexander v. Louisiana*, 405 U.S. 625, 633, 92 S.Ct. 1221, 1226-27, 31 L.Ed.2 330, 337 (6th Cir.

1977). But see *Carter v. Jury Commission*, 396 U.S. 320, 330, 90 S.Ct. 518, 523-24, 24 L.Ed.2d 549, 557-58 (1970) (racial or national composition subject to federal scrutiny).

IX. *Instruction allowing jury to find defendant guilty of first degree murder without reaching agreement as to the precise nature of his acts.* Defendant next contends that the instruction defining first degree murder allowed the jury to convict him of that crime without necessarily reaching agreement as to what acts he performed to commit it. The instruction provided in pertinent part as follows:

Before the Defendant can be found guilty of such crime, the State must prove each of the following propositions:

A. That on or about December 24, 1968, in Polk County, Iowa, the defendant did wilfully and unlawfully kill Pamela Powers.

B. That such action on the part of the Defendant was done with malice aforethought.

C. That such action of the Defendant was done with deliberation, premeditation and with a specific intent to kill Pamela Powers; or,

Was done in the perpetration of the crime of Attempted Rape.

Stated in another way, defendant argues that because subparagraph C allows alternative theories, six jurors could have found that he killed Pamela Powers with deliberation, premeditation and specific intent to kill, while the other six could have rejected that hypothesis and found that it was done in the perpetration of an attempted rape. While he admits he has no federal constitutional right to a unanimous jury in a state criminal prosecution, see *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), he contends that he is entitled to a more stringent standard than one allowing a six to six split.

The State points out, and defendant concedes, that this issue was not presented to trial court. Defendant argues, nevertheless, that trial court had the duty to instruct fully and fairly on all the issues, even without request, and that this court must review for a fair trial, regardless of whether an issue was preserved.

[41] Defendant's contentions for review without preservation were considered and rejected in *State v. Sallis*, 262 N.W.2d 240, 248 (1978). Because this issue was not raised in the trial court, it cannot be effectively asserted here.

[42-44] Even if we were to reach defendant's contention, however, we would not be inclined to agree with it. He relies upon *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977). In that case, Gipson was charged with a violation of 18 U.S.C. § 2313, which prohibits the sale or receipt of stolen motor vehicles and aircraft. The trial court's instructions permitted the jury to find Gipson guilty if each individual juror found that he performed one of six prohibited acts—receiving, concealing, storing, bartering, selling or disposing—on a vehicle. 553 F.2d at 458. The court of appeals found that these six acts fell into two groups. The first three acts constituted one group, while the last three constituted the second. Within each group, the three listed acts were considered by the court of appeals to be "sufficiently analogous to permit a jury finding of the *actus reus* element of the offense to be deemed 'unanimous' despite differences among the jurors as to which of the intragroup acts the defendant committed." *Id.*

Assuming that we should apply the *Gipson* standard to the instruction complained of here, no infirmity has been shown to exist. First, *Gipson* focused on the *actus reus* element of the offense. The instruction complained of here allows alternative juror findings not on the *actus reus*, but on the mental elements of the crime of first degree murder. This is because felony murder is simply a specific method set apart by the legislature by

which the prosecution may show that defendant was acting with the evil state of mind which is necessary to support a finding of first degree murder. *State v. Wilson*, 220 Kan. 341, 344-45, 552 P.2d 931, 935-36 (1976); *People v. Jackson*, 20 N.Y.2d 440, 450, 285 N.Y.S.2d 8, 17-18, 231 N.E.2d 722, 729-30 (1967), *cert. denied*, 391 U.S. 928, 88 S.Ct. 1815, 20 L.Ed.2d 668 (1968). Thus the *actus reus*, which is what *Gipson* focused on, is identical for either type of first degree murder. That is, the jury, under either theory, had to find that defendant killed Pamela Powers.

Second, assuming that the *Gipson* standard might be taken beyond the *actus reus* to apply to mental elements, the mental elements here are sufficiently analogous to meet the *Gipson* standard. Under section 690.2, The Code 1966 (current version at § 707.2, The Code 1979), it was necessary for the State to show that defendant committed murder in the perpetration of a felony. The mere showing of a killing was insufficient. *State v. Conner*, 241 N.W.2d 447, 463 (Iowa 1976). Thus, malice aforethought is a required element of felony murder as well as of the type of first degree murder which must be deliberate and premeditated. *State v. Galloway*, 275 N.W.2d 736, 737-38 (Iowa 1979). And, as demonstrated above, a showing that the murder occurred in the perpetration of a felony is merely a particular statutorily prescribed method for showing the mental elements of deliberation and premeditation.

Several other state courts have reached this same result. See *People v. Chavez*, 37 Cal.2d 656, 670-72, 234 P.2d 632, 641-42 (1951) (en banc); *State v. Souhrada*, 122 Mont. 377, 384-85, 204 P.2d 792, 796 (1949); *People v. Sullivan*, 173 N.Y. 122, 127-30, 65 N.E. 989, 990 (1903). *People v. Olsson*, 56 Mich.App. 500, 224 N.W.2d 691 (1974), cited by defendant in support of his position, is simply not persuasive.

Reversal cannot be predicated on this ground.

X. *Ineffective assistance of counsel.* Defendant claims that his trial counsel were ineffective in two respects: because they advised him not to testify in his own behalf, and because they failed to introduce the testimony of a witness which he claims supported his theory of the case. Our disposition of his claims only requires that we explain them briefly.

Defendant's factual theory was that Pamela Powers had been molested and murdered by another person. That other person left her body in defendant's room, where defendant found it. Fearful of being accused of the murder, defendant carried the body out of the YMCA and hid it in the ditch where it was found two days later.

Defendant now argues that for that theory to be believable, he should have testified in his own behalf. To remove the decision from the realm of trial tactics, defendant contends that the reasons which trial counsel gave for recommending that defendant not testify, which were made a part of the record, were inadequate as a matter of law. He also complains that the testimony of a witness which was available in deposition form and which he contends supports his factual theory of the case was not introduced at trial.

[45] Recently, we have been extremely reluctant to adjudicate claims of ineffective assistance on direct appeals. This reluctance has been due to the lack of full development of the facts surrounding the representation complained of. There has been increasing concern that the State and the attorneys whose effectiveness is being attacked should have an opportunity to rebut allegations of ineffectiveness. See *State v. Smith*, 282 N.W.2d 138, 143-44 (Iowa 1979); *State v. O'Connell*, 275 N.W.2d 197, 205-06 (Iowa 1979); *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). See also *State v. Barber*, 301 So.2d 7, 9 (Fla.1974); *State v. Bosler*, 432 S.W.2d 237, 239 (Mo.1968); *Commonwealth v. Wade*, 480 Pa. 160, 172-74, 389 A.2d 560, 566-67 (1978)(re-mand from direct appeal ordered for evidentiary hearing on in-

effective assistance). We therefore decline to consider whether defendant's counsel were ineffective. His right to raise that issue by postconviction proceedings, ch. 663A, The Code, is reserved.

XI. The Polk County Medical Examiner's change of opinion.

In his final assignment of error, defendant argues that trial court should have held an evidentiary hearing on his motion in arrest of judgment. That motion alleged, in the division relevant here, that Dr. R. C. Wooters, the Polk County Medical Examiner, changed his medical opinion on a subject which was critical to the defendant only shortly before defendant was to call him to testify. This, in defendant's opinion, denied him a fair trial.

[46] We, however, do not reach the issue. This is another division of the motion in arrest of judgment discussed above, in division IV B. As explained there, trial court's jurisdiction was terminated before it ruled on this motion. Thus we have nothing to review.

We have considered all of the issues presented for review, whether specifically discussed or not, and none warrants a reversal. Defendant's conviction stands affirmed.

AFFIRMED.

All Justices concur except HARRIS, J., who concurs in result.

APPENDIX F

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

Civil No. 80-450-D

Robert Anthony Williams,
Petitioner,

v.

Crispus Nix, Warden, Iowa State Penitentiary, and
Attorney General of the State of Iowa,
Respondents.

**Memorandum Opinion and
Order Denying Writ of Habeas Corpus**

This is a habeas corpus proceeding under 28 U.S.C. § 2254 brought by an inmate of the Iowa State Penitentiary at Fort Madison, Iowa, where respondent Crispus Nix is the warden.¹ Petitioner is serving a sentence of life in prison imposed on August 19, 1977, by Iowa District Court Judge J. P. Denato after petitioner was found guilty by a jury of first degree murder. The conviction was affirmed by the Iowa Supreme Court. *State v. Williams*, 285 N.W.2d 248 (Iowa 1979).

The court heard evidence and oral arguments, and the case is now fully submitted for decision upon the record, including transcripts of proceedings in state court, affidavits submitted by the parties, evidence received by this court, and the briefs and oral arguments of counsel.

¹ Since this action was commenced, named defendant David Scurr ceased serving as warden of the Iowa State Penitentiary and he has been replaced by Crispus Nix, who is automatically substituted as party defendant under the provisions of Fed. R. Civ. P. 25(d)(1).

FIRST CONVICTION VACATED

The conviction under review is the petitioner's second conviction for the same offense. His first conviction was, after first being affirmed by the Iowa Supreme Court, *State v. Williams*, 182 N.W.2d 396 (Iowa 1971), vacated in a federal habeas corpus proceeding. *Williams v. Brewer*, 375 F. Supp. 170 (S.D. Iowa), *aff'd*, 509 F.2d 227 (8th Cir. 1974), *aff'd sub nom.*, *Brewer v. Williams*, 430 U.S. 387 (1977). The United States Supreme Court held that petitioner's constitutional right to counsel had been violated by a Des Moines police detective shortly after his arrest and that certain evidence obtained as a result of that violation had been wrongfully admitted into evidence at his trial.

USE OF INEVITABLE DISCOVERY DOCTRINE

Petitioner asserts that admission of evidence of discovery of the victim's body and other evidence resulting from that discovery violated his Fifth Amendment right not to incriminate himself and his Sixth Amendment right to counsel, both applicable to states through the Fourteenth Amendment, under the "fruit of the poisonous tree doctrine." This contention requires a review of some facts and the holdings of the federal courts in the first habeas corpus proceeding. The facts are well recited in the United States Supreme Court opinion in *Brewer v. Williams*, *supra*, 430 U.S. at 390-93:

On the afternoon of December 24, 1968, a 10-year-old girl named Pamela Powers went with her family to the YMCA in Des Moines, Iowa, to watch a wrestling tournament in which her brother was participating. When she failed to return from a trip to the washroom, a search for her began. The search was unsuccessful.

Robert Williams, who had recently escaped from a mental hospital, was a resident of the YMCA. Soon after the girl's disappearance Williams was seen in the YMCA lobby

carrying some clothing and a large bundle wrapped in a blanket. He obtained help from a 14-year-old boy in opening the street door of the YMCA and the door to his automobile parked outside. When Williams placed the bundle in the front seat of his car the boy "saw two legs in it and they were skinny and white." Before anyone could see what was in the bundle Williams drove away. His abandoned car was found the following day in Davenport, Iowa, roughly 160 miles east of Des Moines. A warrant was then issued in Des Moines for his arrest on a charge of abduction.

On the morning of December 26, a Des Moines lawyer named Henry McKnight went to the Des Moines police station and informed the officers present that he had just received a long-distance call from Williams, and that he had advised Williams to turn himself in to the Davenport police. Williams did surrender that morning to the police in Davenport, and they booked him on the charge specified in the arrest warrant and gave him the warnings required by *Miranda v. Arizona*, 384 U.S. 436. The Davenport police then telephoned their counterparts in Des Moines to inform them that Williams had surrendered. McKnight, the lawyer, was still at the Des Moines police headquarters, and Williams conversed with McKnight on the telephone. In the presence of the Des Moines chief of police and a police detective named Leaming, McKnight advised Williams that Des Moines police officers would be driving to Davenport to pick him up, that the officers would not interrogate him or mistreat him, and that Williams was not to talk to the officers about Pamela Powers until after consulting with McKnight upon his return to Des Moines. As a result of these conversations, it was agreed between McKnight and the Des Moines police officials that Detective Leaming and a fellow officer would drive to Davenport to pick up Williams, that they would bring him directly back to Des Moines, and that they would not question him during the trip.

In the meantime Williams was arraigned before a judge in Davenport on the outstanding arrest warrant. The judge advised him of his *Miranda* rights and committed him to jail. Before leaving the courtroom, Williams conferred with a lawyer named Kelly, who advised him not to make any statements until consulting with McKnight back in Des Moines.

Detective Leaming and his fellow officer arrived in Davenport about noon to pick up Williams and return him to Des Moines. Soon after their arrival they met with Williams and Kelly, who, they understood, was acting as Williams' lawyer. Detective Leaming repeated the *Miranda* warnings, and told Williams:

“[W]e both know that you're being represented here by Mr. Kelly and you're being represented by Mr. McKnight in Des Moines, and . . . I want you to remember this because we'll be visiting between here and Des Moines.”

Williams then conferred with Kelly alone, and after this conference Kelly reiterated to Detective Leaming that Williams was not to be questioned about the disappearance of Pamela Powers until after he had consulted with McKnight back in Des Moines. When Leaming expressed some reservations, Kelly firmly stated that the agreement with McKnight was to be carried out—that there was to be no interrogation of Williams during the automobile journey to Des Moines. Kelly was denied permission to ride in the police car back to Des Moines with Williams and the two officers.

The two detectives, with Williams in their charge, then set out on the 160-mile drive. At no time during the trip did Williams express a willingness to be interrogated in the absence of an attorney. Instead, he stated several times that “[w]hen I get to Des Moines and see Mr. McKnight, I

am going to tell you the whole story." Detective Leaming knew that Williams was a former mental patient, and knew also that he was deeply religious.

The two detective and his prisoner soon embarked on a wideranging conversation covering a variety of topics, including the subject of religion. Then, not long after leaving Davenport and reaching the interstate highway, Detective Leaming delivered what has been referred to in the briefs and oral arguments as the "Christian burial speech." Addressing Williams as "Reverend," the detective said:

"I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

Williams asked Detective Leaming why he thought their route to Des Moines would be taking them past the girl's body, and Leaming responded that he knew the body was in the area of Mitchellville—a town they would be passing

on the way to Des Moines.¹ Leaming then stated: "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road."

As the car approached Grinnell, a town approximately 100 miles west of Davenport, Williams asked whether the police had found the victim's shoes. When Detective Leaming replied that he was unsure, Williams directed the officers to a service station where he said he had left the shoes; a search for them proved unsuccessful. As they continued towards Des Moines, Williams asked whether the police had found the blanket, and directed the officers to a rest area where he said he had disposed of the blanket. Nothing was found. The car continued towards Des Moines, and as it approached Mitchellville, Williams said that he would show the officers where the body was. He then directed the police to the body of Pamela Powers.

¹ The fact of the matter, of course, was that Detective Leaming possessed no such knowledge.

At the first trial, Judge Denato denied petitioner's motion to suppress all evidence relating to or resulting from any statements petitioner made during the trip from Davenport to Des Moines on the ground that petitioner had waived his right to have an attorney present when he made the statements to Detective Leaming. *Id.* at 394. A bare majority of the Iowa Supreme Court justices agreed with Judge Denato. *State v. Williams, supra*, 182 N.W.2d. Judge Hanson of the United States District Court disagreed and held that the incriminating statements were wrongfully admitted. He based his conclusion on three separate grounds: (1) denial of assistance of counsel; (2) denial of rights under *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966); and (3) involuntariness of the statements. *Williams v. Brewer, supra*. The court of appeals affirmed, 2-1, on the basis of Judge Hanson's

first and second grounds, but did not address the involuntariness ground. *Williams v. Brewer, supra*. The United States Supreme Court affirmed, 5-4, on the ground that petitioner was denied the assistance of counsel, but did not address the other two grounds. *Brewer v. Williams, supra*. All three federal courts found that petitioner had not waived his right to counsel.

On retrial, petitioner's counsel moved to suppress evidence of the discovery of the victim's body and other evidence resulting from that discovery on the ground that such evidence was fruit of the poisonous tree. After an evidentiary hearing, Judge Denato denied the motion based on his finding that searchers, who were systematically searching for the body, would have soon discovered it even if petitioner had not made the statements to Detective Leaming and had not led the police to the body, and the evidence was admitted at the trial.² The Iowa Supreme Court, on a de novo review of the evidence,³ also found that the body would have been discovered anyway. *State v. Williams, supra*, 285 N.W.2d at 262.

² Of course, petitioner's statements to Detective Leaming and the fact that he led the police to the body were not placed in evidence. In a footnote to its opinion, the United States Supreme Court had stated:

While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams. Cf. *Killough v. United States*, 119 U.S. App.D. C. 10, 336 F.2d 929. In the event that a retrial is instituted, it will be for the state courts in the first instance to determine whether particular items of evidence may be admitted.

Brewer v. Williams, 430 U.S. 387, 407 n.12.

³ Whenever a constitutional challenge is presented to the Iowa Supreme Court, the court reviews the evidence de novo. *Armento v. Baughman*, 290 N.W.2d 11, 15 (Iowa 1980); *Watts v. State*, 257 N.W.2d 70, 71 (Iowa 1977).

Petitioners makes three specific contentions in respect to the state courts' inevitable discovery ruling: (1) the inevitable discovery doctrine applied by them is constitutionally deficient; (2) the burden of proof applied by them is constitutionally inadequate; and (3) the finding that the body would have been discovered in any event is not supported by the record.

The Doctrine

The Iowa Supreme Court exhaustively treated the inevitable discovery doctrine issue. *Id.* at 255-62. The court noted that the constitutional propriety of the inevitable discovery doctrine exception to the exclusionary rule has not been considered by the United States Supreme Court. *Id.* at 256.⁴ Noting the body of law from the lower federal courts and the courts of other states, *id.* at 256-58, the Iowa Supreme Court concluded that the doctrine was a "constitutionally sound exception to the rule of exclusion." *Id.* at 260. The inevitable discovery doctrine has not met with unanimous approval from the courts and commentators, *id.* at 257-58, although the body of law supporting the doctrine continues to develop.⁵

It is this court's conclusion that the two-part test applied by the Iowa Supreme Court is not constitutionally deficient. The test requires the prosecution to show that (1) the police did not act in bad faith for the purpose of hastening discovery of the evidence in question, and (2) that the evidence would have been discovered by lawful means. *Id.* at 260. The second prong of the test requires proof of how the evidence would have been

⁴ But see footnote 2, *supra*.

⁵ Recent federal cases applying the doctrine include *United States v. Hubert*, 637 F.2d 630 (9th Cir. 1980); *United States v. Kandick*, 633 F.2d 1334 (9th Cir. 1980); *United States v. Bienvenue*, 632 F.2d 910 (1st Cir. 1980); *United States v. Brookins*, 614 F.2d 1037 (5th Cir. 1980) (limited rule).

discovered. *Id.* at 258. The Iowa Supreme Court stressed that a "showing that discovery *might* have occurred is entirely inadequate" and that a "determination that a discovery would have come about must rest upon the record." *Id.* at 260.

Petitioner relies heavily on *Wong Sun v. United States*, 371 U.S. 471 (1963), as support for his contention that the Iowa courts committed constitutional error. The decision in *Wong Sun* rested on a finding that the challenged evidence would not have been found except for the constitutional violation. *Id.* at 487-88. Thus, *Wong Sun* does not foreclose the inevitable discovery doctrine as a constitutionally permissible exception to the exclusionary rule.

Petitioner also relies on *Brown v. Illinois*, 422 U.S. 590 (1975), and *United States v. Wade*, 388 U.S. 218 (1967). *Brown* dealt with the attenuation exception to the exclusionary rule which is analytically different from the inevitable discovery doctrine, and therefore is inapposite. *Wade* dealt with in-court identifications of the defendant by witnesses who had previously identified him at a lineup conducted without the presence of his counsel. The Supreme Court declined to bar any possible in-court identification by the witnesses who had participated in the lineup. Rather, the Court ruled that the government should first be afforded the opportunity to establish that the identifications "were based upon observations of the suspect other than the lineup identification." *United States v. Wade, supra*, 388 U.S. at 240. Thus *Wade* dealt with the independent origin exception to the exclusionary rule which is somewhat similar to the inevitable discovery rule. The articulated rule was necessary so as to not "render the right to counsel an empty one," *id.* by crystallizing the witnesses' identification and effectively foreclosing any defense based upon mis-identification. The inevitable discovery doctrine applied by the Iowa Supreme Court did not empty petitioner's right to counsel of its protection because the state had the burden of proving that the body would have been found anyway, and defendant's counsel could cross-examine the state's witnesses and present evidence on behalf of defendant at the suppression hearing.

As the multitude of cases dealing with the exclusionary rule make clear, the purpose of the rule is to deter conduct in contravention of constitutional rights. See *Brown v. Illinois, supra*, 422 U.S. at 599-600. The inevitable discovery doctrine articulated and applied by the Iowa Supreme Court does not frustrate the exclusionary rule's deterrence purpose because the test requires an absence of bad faith on the part of the police and proof that the police would have discovered the evidence in any event.

The Burden of Proof Standard

The burden of proof standard applied by the Iowa courts was preponderance of the evidence. *State v. Williams, supra*, 285 N.W.2d at 260. Petitioner, relying on *United States v. Wade, supra*, asserts that the Constitution demands a clear and convincing standard. In *Wade* the Court stated that it would not require exclusion of courtroom identifications of the defendant, where pretrial lineups were conducted in the absence of the defendant's counsel, "without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification." *United States v. Wade, supra*, 388 U.S. at 240.

The Iowa Supreme Court relied in part upon the plurality decision in *Lego v. Twomey*, 404 U.S. 477, 489 (1972) (voluntariness of confession hearing) and the majority opinion in *United States v. Matlock*, 415 U.S. 164, 177-78 n.14 (1974) (generalized statement regarding burden of proof at suppression hearings).

Petitioner argues that the Sixth Amendment right to counsel requires a higher burden of proof than that applied at suppression hearings arising out of alleged Fourth Amendment violations. The basis of this argument is that the exclusionary rule invoked in Fourth Amendment cases is a judicially created remedy to enforce that constitutional right whereas the Sixth

Amendment exclusionary rule is an essential element of the constitutional right. Such is also true of the Fifth Amendment right of a criminal defendant to not be compelled to testify against himself. "In that sense, the exclusion of involuntary confessions derives from the [Fifth] Amendment itself. *United States v. Janis*, 428 U.S. 433, 443 (1976)." *United States v. Raddatz*, 447 U.S. 667, 678 n.4 (1980). *Lego* upheld the preponderance of the evidence standard at suppression hearings to determine the voluntariness of confessions.

The Iowa Supreme Court was correct in applying the preponderance of the evidence standard rather than requiring proof by clear and convincing evidence. *Cf. United States v. Morrison*, 449 U.S. 361 (1981) (Sixth Amendment rights protected by remedies similar to remedies invoked for violation of other constitutional rights).

Evidence to Support Finding

Petitioner argues that the evidence introduced at the suppression hearing was not sufficient to support the state's burden of proof. The evidence before the state courts is well summarized in *State v. Williams*, *supra*, 285 N.W.2d at 260-62, and need not be reiterated here.

The Iowa Supreme Court's finding is a factual finding which this court may review only within the limits of 28 U.S.C. § 2254(d). *See Sumner v. Mata*, 101 S.Ct. 764, 769 (1981) (discussing *Taylor v. Lombard*, 606 F.2d 371, 375 (2d Cir. 1979), *cert. denied*, 445 U.S. 946 (1980)). Under section 2254(d), the court's finding is presumed to be correct—indeed, this presumption of correctness is mandated by the statute. *See Sumner v. Mata*, *supra*, 101 S. Ct. at 769. Only if one of the exceptions enumerated in section 2254(d) is established is this presumption overcome.

A review of the evidence before the state courts leads this court to conclude that the evidence was sufficient to permit the

finding that the state had proved by a preponderance of the evidence that the body would have been discovered by the searchers in any event. Nothing in the state court record establishes any of the exceptions enumerated in section 2254(d).

However, petitioner contends that additional evidence relating to the body and the search introduced in this court at the habeas corpus hearing, referred to in petitioner's post-hearing memorandum and referred to hereinafter as newly discovered evidence, establishes that the material facts were not adequately developed at the suppression hearing and that the suppression hearing was not full, fair and adequate. 28 U.S.C. § 2254(d), exceptions 3 and 6. Petitioner further contends that the whole evidentiary record, as expanded by the newly discovered evidence, cannot support a finding of inevitable discovery of the body.

Perhaps the newly discovered evidence should not even be considered in this habeas corpus proceeding for lack of exhaustion of state remedies. Petitioner has not sought state post-conviction relief on the grounds of newly discovered evidence under Iowa Code Chapter 663A. However, the exhaustion doctrine, codified in 28 U.S.C. § 2254(b) and (c), is based on principles of comity rather than jurisdiction. *Cage v. Auger*, 514 F.2d 1231, 1232-33 (8th Cir. 1975). Under all the circumstances it would appear to be unnecessarily burdensome on the parties and the state and federal courts to require this inevitable discovery issue to be relitigated in the Iowa courts and then relitigated in the federal courts. The newly discovered evidence will be considered in this proceeding. See *Austin v. Swenson*, 522 F.2d 168, 170 (8th Cir. 1975); *Losieau v. Sigler*, 421 F.2d 825, 828 (8th Cir. 1970).

I doubt that the newly discovered evidence^{*} is of sufficient

^{*} The newly discovered evidence consists of previously overlooked photographs of the body at the site of its discovery and recent deposition testimony of the investigative officer in charge of the search. This newly discovered evidence neither adds much to nor subtracts much from the suppression hearing evidence.

import to demonstrate that the material facts were not adequately developed in the suppression hearing or that petitioner did not receive a full, fair and adequate suppression hearing. However, that question need not be decided because it is this court's independent finding and conclusion, based on a preponderance of all the evidence including the newly discovered evidence, that Pamela Powers' body would soon have been found by the searchers in essentially the same condition it was in at the time of the actual discovery, even if petitioner had not made any statements and had not led the police to the body. The body was right next to the end of a culvert located beneath a road. Much of the body was covered with snow, but her face and part of her brightly colored striped shirt were not touched by snow and were completely exposed to the view of any person looking at the end of the culvert. The searchers were going into the ditches to look into all culverts, and they would have searched along the road where the culvert and body were located.

The state has fulfilled its burden of proving inevitable discovery of the body.

DENIAL OF REQUEST FOR OUT-OF-STATE COUNSEL

Petitioner alleges that Judge Denato's denial of his application for appointment of a California lawyer denied him his right to counsel under the Sixth and Fourteenth Amendments, and due process of law and equal protection of the law under the Fourteenth Amendment. In his application for appointment of counsel, petitioner requested that a California lawyer who is licensed to practice in California and Michigan, but not in Iowa, and an Iowa lawyer be appointed to represent him. The requested Iowa lawyer and two other Iowa lawyers were appointed to represent petitioner, but the California lawyer was not appointed.

Petitioner concedes that the right to counsel protected by the Sixth Amendment does not include an absolute right to choose appointed counsel. He argues, however, that because an indigent defendant has the right to demand appointed counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and also has the right to choose to represent himself, *Faretta v. California*, 422 U.S. 806 (1975), he therefore has the right to have a specific attorney (here, the California attorney) appointed to represent him absent a substantial countervailing state interest. Petitioner has supplied no authority directly in support of his proposition and the court has found none.

There is no merit in plaintiff's position. This court fully concurs in the thorough and sound disposition of this issue made by the Iowa Supreme Court. *State v. Williams, supra*, 285 N.W.2d at 253-55. Petitioner was constitutionally entitled to the assistance of effective counsel, and he got that. But he had no constitutional right, absolute or qualified, to appointment of an out-of-state lawyer of his own choosing.

DENIAL OF REQUEST FOR OPINION POLL

On petitioner's motion, the trial was transferred from Polk County to Linn County, a county selected by petitioner and his counsel.

Petitioner argues that he was denied effective assistance of counsel, due process and equal protection of the law because Judge Denato denied his request for funds to conduct public opinion polls in five Iowa counties other than Polk County for the purpose of selecting a transferee county.

These constitutional claims are without merit. They were adequately disposed of by the Iowa Supreme Court, *id.* at 266, and need not be further discussed.

DENIAL OF JUROR CHALLENGE

Petitioner contends that he was denied due process when the trial court denied his challenge for cause of a prospective juror. The prospective juror was eventually removed by petitioner using one of his peremptory challenges. *Id.* at 267. The Iowa Supreme Court held that the denial was not subject to review on appeal because the challenge was not sufficiently specific as required by state law, but went on to express doubt that the contention had merit. *Id.*

A preliminary issue raised by respondent is the applicability of *Wainwright v. Sykes*, 433 U.S. 72 (1977), which holds that failure to comply with a state's contemporaneous objection rule, absent cause and actual prejudice, precludes habeas corpus review of matters to which objection was not lodged. *Id.* at 87; *Parton v. Wyrick*, 614 F.2d 154, 157 (8th Cir.), *cert. denied*, 449 U.S. 846 (1980). *Wainwright* may not control because an objection, albeit an inadequate one, was made. In any event, the issue will be disposed of on its merits.

A review of the voir dire examination of the prospective juror leads to the conclusion that petitioner is not entitled to relief. The transcript does not reveal any abuse of the discretion placed in the hands of Iowa trial court judges to rule on challenges for cause. *See State v. Winfrey*, 221 N.W.2d 269, 273 (Iowa 1974). The denial of the challenge did not violate petitioner's right to due process of law.

SUFFICIENCY OF EVIDENCE—JACKSON v. VIRGINIA

Petitioner's next due process ground for relief is his claim that the trial court erroneously denied his motion for a directed verdict on the charge of premeditated first degree murder. In a strict sense petitioner's asserted ground for relief goes only to the sufficiency of the evidence to submit the charge to the jury. *Jackson v. Virginia*, 443 U.S. 307 (1979), involved the separate

question of whether the evidence was sufficient to uphold a finding of guilty that had been made. However, the standard announced in *Jackson v. Virginia* is the logical one to apply.

Habeas corpus relief must issue if "it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, *supra*, 443 U.S. at 324. The review of the record is made in "the light most favorable to the prosecution." *Id.*

Applying the standard of *Jackson v. Virginia*, *supra*, the evidence was sufficient for a rational trier of fact to find proof of the elements of deliberation and premeditation beyond a reasonable doubt. See *State v. Williams*, *supra*, 285 N.W.2d at 267-68.

INDICTMENT—SUBMISSION VARIANCE

Petitioner asserts as due process grounds for relief an alleged variance between the grand jury indictment and one of the theories of guilt submitted to the jury. The indictment accused him "of the crime of murder as defined in Sections 690.1 and 690.2 of the 1966 Code of Iowa [in] that [defendant] . . . did with malice aforethought, premeditation, deliberation and intent to kill, murder Pamela Powers in Polk County, Iowa." Instruction No. 8 submitted to the jury as an alternative to premeditated murder a felony murder theory—that petitioner murdered Pamela Powers in the perpetration of an attempted rape.⁷ The gist of petitioner's argument is that submission of Instruction No. 8 to the jury violated his due process right to be tried only on the offense charged in the indictment.

⁷ The 1966 Iowa Code § 690.2 provided:

All murder which is perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem, or burglary, is murder in the first degree * * *.

Iowa case law provides that when the state chooses to specify the manner in which a crime was committed, a defendant cannot "properly be convicted upon a finding it was committed by means not alleged." *State v. Hockmuth*, 127 N.W.2d 658, 659 (Iowa 1964). See also *State v. Allen*, 293 N.W.2d 16, 22 (Iowa 1980); *State v. Black*, 282 N.W.2d 733, 734 (Iowa 1979); *State v. Bakker*, 262 N.W.2d 538, 542 (Iowa 1978). Petitioner's counsel, however, did not challenge the jury instruction on the grounds of variance. The challenge could have been raised in a motion for a new trial unless it had been expressly waived. *State v. Williams*, *supra*, 285 N.W.2d at 268. The Iowa Supreme Court held that the claimed error in the jury instruction was expressly waived by petitioner's counsel. *Id.* at 268-69. Respondent argues that petitioner is not entitled to have this court review the merits of the claim unless cause and prejudice have been established. *Wainwright v. Sykes*, *supra*; *Francis v. Henderson*, 425 U.S. 536 (1976).

In *Collins v. Auger*, 577 F.2d 1107 (8th Cir. 1978), the United States Court of Appeals for the Eighth Circuit seemingly approved the following definition of cause: "[L]ack of knowledge of the facts or law would be sufficient cause for failure to make the proper objection * * *." *Id.* at 1110 n.2. Two of petitioner's trial counsel have submitted affidavits to show that under the *Collins* standard there is cause, based on their lack of knowledge of the law, for failing to object to the jury instruction. The two affidavits may be sufficient to establish cause for failing to object. In addition, trial counsel state in their affidavits that they did not consider or discuss the possibility of a Fourteenth Amendment due process objection. On the basis of *Collins*, petitioner has shown cause for failure to object to Instruction No. 8 on the grounds of variance.

The prejudice prong of *Wainwright v. Sykes* inheres in the merits of petitioner's contention. The court will dispose of the issue on the merits.

Initially it should be noted that petitioner has not shown that the felony murder theory or the evidence in support of it prejudiced his defense or came as a surprise. *Ridgeway v. Hutto*, 474 F.2d 22 (8th Cir. 1973)(challenge to variance on Sixth Amendment grounds). Indeed, although neither party brought it to my attention, the state court record before this court discloses that the felony murder theory was also submitted to the jury in petitioner's first trial in 1969. (Instruction No. 6 of Statement and Instructions filed May 6, 1969.) Thus, petitioner and his counsel were fully aware that the theory would no doubt be submitted again in the retrial.

It should also be noted that the Iowa case law, cited *supra*, to the effect that a defendant cannot be properly convicted upon a finding that he committed the crime by means other than the means specifically alleged, is not placed on constitutional grounds.

The essence of petitioner's claim is that he was tried and convicted of a charge of which he was not indicted. Cases dealing with the Fifth Amendment guarantee against being held to answer for a federal felony "unless on a presentment or indictment of a Grand Jury" are inapposite because that constitutional provision does not apply to the states through the Fourteenth Amendment. *Hurtado v. California*, 110 U.S. 516 (1884). Cases holding that a conviction for violating a code section not charged in the indictment violates due process are also inapposite because the indictment charged a violation of "Code sections 690.1 and 690.2," and murder committed in the attempt to perpetrate a rape is included in section 690.2. See footnote 7, *supra*. Furthermore, the minutes of grand jury evidence attached to the indictment, particularly the minutes of Dr. Leo

Luka's testimony, showed that the state would produce evidence supporting the felony murder theory. The fact that the felony murder theory was tried and submitted at the first trial has been previously noted.

In *Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977), the court held that where a criminal defendant was forced to defend against felony-murder although charged only with deliberate and premeditated first degree murder, the resulting conviction was a denial of due process under the Fourteenth Amendment. However, in that case Ohio law made it clear that premeditated murder and felony-murder were two separate offenses. *Id.* at 334-35. Under Iowa law there is but one offense of murder. *State v. Conner*, 241 N.W.2d 447, 460 (Iowa 1976). Thus, petitioner was not tried and convicted of a crime for which he was not indicted. *Cf. Conner v. Auger*, 595 F.2d 407, 410-11 (8th Cir. 1979).

Submission of the felony murder theory did not deprive petitioner of due process of law. Felony murder was within the indictment and petitioner and his counsel had full and fair notice of the charges against him and of the fact that the felony murder theory would be submitted.¹

¹ The Iowa Supreme Court's decision affirming petitioner's first conviction and the subsequent federal habeas corpus decisions disclose that petitioner did not then complain about submission at the first trial of the felony murder theory. Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts requires that a petition "shall specify all the grounds for relief which are available to the petitioner and of which he has * * * knowledge." Although the quoted rule may not apply because the first conviction was set aside on other grounds and it is a new conviction that is now under review, it is my opinion that petitioner's failure to assert this ground in his first habeas corpus proceeding ought to bar him from now doing so. Had he asserted the ground after the first conviction, the issue might have then been resolved by the reviewing courts for the guidance of the parties and the trial court in the second trial. Piecemeal post-conviction litigation is a plague on our system of criminal justice.

POSSIBLE LACK OF UNANIMITY ON THEORY

Petitioner's final contention is that the court's instructions permitted the jury to return a verdict of guilty without reaching a unanimous conclusion that petitioner committed either premeditated murder or felony murder. This contention was also not made to the trial court and the Iowa Supreme Court held that the issue could not be asserted for the first time on appeal. *State v. Williams, supra*, 285 N.W.2d at 269. Respondent argues that the procedural waiver imposed by the Iowa Supreme Court precludes petitioner from raising the issue here. *Wainwright v. Sykes, supra*.

Under *Collins v. Auger, supra*, petitioner has established cause for failure to raise the issue before the trial court. Whether prejudice has been established need not be decided because that determination is entwined with the merits of petitioner's claim. If Instruction No. 8 permitted a non-unanimous decision by the jury and unanimity was required by due process, then prejudice would necessarily follow. The merits will be reached.

The essence of petitioner's argument is that he was entitled to have the jurors instructed that they must, before finding defendant guilty, unanimously agree on the means of the murder—either (1) with premeditation, deliberation and with a specific intent to kill or (2) in attempting to perpetrate a rape. No such instruction was requested by petitioner or his counsel.

Cases dealing with the requirement of unanimity urged by petitioner are few. Generally, "it is assumed that a general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict." " *United States v. Murray*, 618 F.2d 892, 898 (2d Cir. 1980), quoting from *United States v. Natelli*, 527 F.2d 311, 325 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976). See also *United*

States v. Pavloski, 574 F.2d 933, 936 (7th Cir. 1978). Such a general instruction was given at petitioner's trial. There was no instruction given at petitioner's trial that expressly permitted a verdict based on different findings by individual jurors, as was the case in *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977).

Based on the foregoing as well as on reasons articulated by the Iowa Supreme Court in its reflections on the same claim, *State v. Williams*, *supra*, 285 N.W.2d at 269-70, it is this court's conclusion that no constitutional error appears.⁹

ORDER DENYING WRIT

Petitioner has failed to demonstrate that his conviction is tainted by any violation of his federal constitutional rights. Accordingly, his petition for a writ of habeas corpus is denied.

DATED this 18th day of December, 1981.

/s/ HAROLD D. VIETOR
United States District Judge

⁹ The unanimity instruction that petitioner claims should have been given to the jury was not given in the first trial either. He did not raise the issue in the appeal or in the habeas corpus proceedings challenging his first conviction. Therefore, the comments in footnote 8, *supra*, are equally applicable to this issue.

AUG 12 1983

ALEXANDER L. STEVENS,
CLERK

No. 82-1651

In The
Supreme Court of the United States

October Term, 1983

CRISPUS NIX, WARDEN OF
THE IOWA STATE PENITENTIARY,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

JOINT APPENDIX

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STATEMENT OF PREVIOUS FILINGS

The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendices accompanying the Petition for Certiorari:

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Opinion of United States Court of Appeals for Eighth Circuit, filed January 10, 1983	A-1
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Supplemental Petition for Writ of Habeas Corpus	RA-1*
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* Reply Appendix to Petition for Writ of Certiorari.

CHRONOLOGICAL LIST OF RELEVANT DOCKET
ENTRIES

Date	Proceedings
1980	
Nov. 4	Petition for Writ of Habeas Corpus filed in United States District Court for the Southern District of Iowa.
1981	
Dec. 18	Order of the District Court Denying Writ of Habeas Corpus
1982	
Jan. 18	Notice of Appeal filed with the United States Court of Appeals for the Eighth Circuit.
1983	
Jan. 10	Opinion and judgment of the Court of Appeals for the Eighth Circuit.
Febr. 9	Petition for Rehearing and Rehearing En Banc filed.
March 15	Orders of the United States Court of Appeals for the Eighth Circuit denying rehearing and rehearing en banc.

No. 82-1651

In The
Supreme Court of the United States
October Term, 1983

CRISPUS NIX, WARDEN OF
THE IOWA STATE PENITENTIARY,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

JOINT APPENDIX

TRANSCRIPT OF MOTIONS
TO SUPPRESS EVIDENCE

IN THE DISTRICT COURT OF THE
STATE OF IOWA
IN AND FOR POLK COUNTY

CR 55805

State of Iowa

vs.

Anthony Erthell Williams

A P P E A R A N C E S

Robert Blink, Assistant County Attorney,

On behalf of the State of Iowa Roger Owens, Gerald
Crawford and John Wellman, Attorneys at Law,

On behalf Anthony Erthell Williams.

This cause came on for hearing at 9:00 a.m. May 31,
1977, before the Honorable James P. Denato, Judge pre-
siding.

Jeffrey S. Laust
Official Court Reporter
102 Polk County Courthouse
Des Moines, Iowa 50309

Transcript Ordered 6-1-77
Transcript Delivered 6-7-77

Shorthand Notes Marked:

"FILED POLK COUNTY, IA.
1977 JUN - 1 AM 9:17
CLARK R. RASMUSSEN
CLERK DISTRICT COURT"

(ORIGINAL)

PROCEEDINGS

[Printer's Note: Pages 3-90 of Original Transcript]

The Court: Let the record formally show that counsel for the defense have asked for separation of the State's witnesses. Mr. Blink, are you ready to proceed? I gather from what you have told me informally that you will proceed in the order of which the motions to suppress were filed.

Mr. Blink: That's correct, Your Honor.

The Court: The first one would be the motion filed May 16. Are you ready to proceed?

Mr. Blink: Yes, Your Honor. I think we might mark these exhibits at this time and expedite matters.

The Court: Okay, excuse me.

(At this time State's Exhibits A through E were marked for identification by the court reporter.)

Mr. Blink: I believe we are ready to proceed, Your Honor.

The Court: Very good.

Mr. Blink: Your Honor, the State would call John Jutte to the stand.

JOHN JUTTE,

called as a witness on behalf of the State, having been first duly sworn by the Court, testified upon his oath as follows:

Direct Examination

By Mr. Blink:

Q. Would you please state your name?

A. My name is John Jutte, J-u-t-t-e.

Q. Would you please tell us what your occupation is, sir?

A. I am a special agent with the Iowa Bureau of Criminal Investigation.

Q. And how long have you been employed in that capacity, sir?

A. Approximately nine years.

Q. Were you employed in that capacity on the 26th day of December, 1968?

A. Yes, sir.

Q. On that date, did you have occasion to observe a body later known to you to be that of Pamela Powers?

A. Yes, sir, I did.

Q. Where did you observe that body, sir?

A. This was in a rural area of Polk County, Iowa, being approximately a mile south and approximately a mile and a half west of the Mitchellville interchange and Interstate 80.

Q. Mr. Jutte, I would like to hand you what has been marked State's Exhibit C and ask you if you can tell me what that depicts, if you know?

A. Yes, sir. I do know.

Q. And what is it, sir?

A. This is a black and white photograph taken at the scene I just described showing the area and the body you mentioned.

Q. Okay. Now, I hand you what has been marked State's Exhibit D and ask you if you can—

The Court: B as in Baker?

Mr. Blink: D as in dog.

Q. Can you tell us what that depicts, if you know?

A. Yes, sir. That also is a black and white photograph of the same general area, also showing the body you referred to from a slightly further distance.

Q. Now, State's Exhibit C, calling your attention to that, does that fairly and accurately depict the condition of the scene where you observed the body when you first observed the body?

A. Yes, sir, it does.

Q. Okay. Is the State's Exhibit D, as in dog, different from State's Exhibit C, as far as the snow depicted thereon?

A. Yes, sir, Exhibit D, as in dog, shows some movement of the snow; some tracks, et cetera.

Q. Okay. Are State's Exhibits C and D fair and accurate representations of what they purport to show?

A. Yes, sir, they are.

Q. Now, I am now going to hand you what has been marked State's Exhibit B as in baker and ask you if you can tell me what that depicts, if you know?

A. This is a color photograph of the same area taken at some different time.

Q. Okay. You have no personal knowledge as to the time that photograph was taken, is that correct?

A. No, sir, I do not.

Q. Okay. And specifically, does that to the best of your knowledge, does that photograph depict the same culvert which is depicted in State's Exhibits C and D?

A. Yes, sir, it appears to be the same exact culvert and location.

Q. I will now hand you what has been marked State's Exhibit A and ask you if you can tell me what that depicts, if you know?

A. This is a color photograph apparently taken from the air of the same general area; the culvert, et cetera, showing a much larger land-surface area.

Q. Is there an automobile depicted in State's Exhibit B?

A. Yes, sir, there is.

Q. Is there an automobile depicted in State's Exhibit A?

A. Yes, sir.

Q. Now, Mr. Jutte, based upon your recollection in the observation of those photographs, I would like you to take a look at what has been marked as Exhibit E.

Mr. Blink: If I might have assistance in moving this to the bench.

The Court: Well, while we have a moment's break here, before I forget, I take it all of these other people are sheriff's deputies?

Gentlemen, you will be required not to talk about the evidence here today with anybody from the press or anybody who is likely to be talking to the press.

Sheriff's Deputies: Yes, sir.

Mr. Blink: For the record, Your Honor, I would state that Exhibit E are maps obtained from the County Engineer depicting the area of Beaver Township in the eastern portion of Polk County as it is juxtaposed to the western border of Jasper County south of Interstate 80, including the Mitchellville area. May it be stipulated that this map which includes sheets D-7 and D-8 are fair and accurate?

Mr. Owens: It may be, Your Honor.

Q. Mr. Jutte, I would like to hand you this red marker and ask you if you would identify on this map where you observed the body.

A. (Witness indicating.)

Q. The record should reflect that the witness Jutte has circled an area on the map and has placed an X where I trust you state the body was found?

A. Yes, sir.

Q. Now, how do you correlate your indication on the map with the photograph, State's Exhibit A?

A. On the map I follow the line of the road leading south of the Mitchellville interchange one mile where it

intersects with a gravel road heading in a westerly direction. I follow that gravel road approximately one and one-half miles west and there locate a number of features on the map of which correspond with the features in the color photograph, Exhibit No. A.

Q. Are there any buildings depicted in State's Exhibit A?

A. Yes, sir, there are.

Q. Are there any indications on the map which would correspond with those buildings?

A. Yes, sir, there are.

Q. Would you just indicate the buildings on State's Exhibit E?

A. (Witness indicating.)

Q. And would you also indicate on State's Exhibit A the same building with a check mark on the photograph, sir? If you would, please.

A. (Witness indicating.)

Q. Now, to the best of your recollection, you have indicated on State's Exhibit E where you observed the body?

A. Yes, sir.

Q. And is it not also true that you were the individual who found the body?

A. Yes, sir.

Q. And that State's Exhibits A through D depict the culvert area where the body was found?

A. That is correct.

Q. And corresponds with the indication on State's Exhibit E?

A. Yes, sir.

Q. And this is all in Polk County, Iowa?

A. That's correct.

Mr. Blink: I have no further questions on direct, Your Honor.

The Court: Any questions?

Mr. Wellman: Yes, Your Honor.

Cross-Examination

By Mr. Wellman:

Q. Officer, what time was it when you came across this body?

A. To the best of my recollection it was approximately 5:45 p.m.

Q. On December 26, 1968, is that correct?

A. Yes, sir, I believe that's correct.

Q. Where were you approximately one hour before that at 4:45 p.m.?

A. Oh, I can't give an exact location, sir. I would have been somewhere east of Des Moines on Interstate 80.

Q. And what were you doing?

A. I was traveling toward Des Moines.

Q. Okay. Were you coming from Davenport, Iowa?

A. Yes, sir.

Q. And were you driving a car?

A. Yes, sir, I was.

Q. And who was in the car with you?

A. I was alone.

Q. Okay. And were you following the automobile containing Detective Leaming and Mr. Williams?

A. I was a distance behind that car. I am not sure "following" is an accurate description, sir.

Q. Well, what were your duties at that time?

A. My duties, primarily, were just to travel from Davenport to Des Moines.

Q. The purpose of that was to follow the car that Mr. Leaming and Mr. Williams was in, isn't that correct?

A. I suppose. Again, I am not sure "follow" is the proper term, but to ultimately arrive in Des Moines.

Q. Now, are you telling us today that you are the first person that came across that body?

A. I can't say I am the first. There were, as I recall, two other officers in the immediate area. I can't really say whether they observed the body a few seconds before I did or a few seconds after.

Q. Well, it was Mr. Williams that pointed out to yourself and Detective Leaming where that body was, isn't that the truth?

A. No, sir. I never talked to Mr. Williams.

Q. Are you telling us that just on your own you discovered that body without any indication that it was there?

A. I had been instructed to look for the body, but not by Mr. Williams.

Q. You mean the purpose of your trip from Davenport to Des Moines, Iowa, was to look for that body?

A. Not initially. No, sir.

Q. Well, who instructed you to look for the body?

A. As I recall, Agent Mayer.

Q. And who was he with?

A. I'm sorry, physically with?

Q. Well—

A. Or his organization?

Q. What was his occupation at that time?

A. I'm sorry, he was an agent with the Bureau also.

Q. And what did he tell you?

A. He instructed me to attempt to locate the body.

Q. Did he tell you where to look?

A. Generally, yes, sir. Not specifically.

Q. When you got off the Iowa Interstate, did you follow the car that contained Mr. Williams and Detective Leaming?

A. There were three cars. I can't recall the order in which—I believe I followed Agent Mayer's car, but I can't really be sure.

Q. Okay. Then he was—it is possible he was following the car containing Mr. Williams and Detective Leaming?

A. That is possible, yes, sir.

Q. And when you came upon the scene where this body was found, there were other people there?

A. That's correct.

Q. And was Mr. Williams one of them?

A. To my recollection, Mr. Williams was in an automobile in the general area.

Q. Well, had that automobile pulled up and stopped by the culvert where the body was found?

A. Again, in the general area. As I recall, it was somewhat beyond.

Q. Well, Officer, are you telling us here today that you found this body just independently through your own efforts?

A. I don't really know how to answer that, sir.

Q. Well, sir, isn't that true that Mr. Williams told police officers where the body was located; drove them there, pointed out the area and then the police officers found the body?

A. I have no knowledge of what Mr. Williams told the other officers.

By Mr. Owens:

Q. Officer Jutte, were there any radio communications between Captain Leaming's car and your car?

A. No, sir.

Q. Who were you following then?

A. Again, I cannot specifically recall if I was directly behind the Leaming auto or directly behind the Mayer auto.

Q. But at any rate, when Officer Leaming's—Captain Leaming's auto turned south on this road, then you followed him, is that correct?

A. Unless Mr. Mayer was between us.

Q. Okay. Then you followed Mr. Mayer if you didn't follow Officer Leaming?

A. That is correct.

Q. And had they not turned south and continued west, you would have followed them west?

A. Excuse me?

Q. On to Des Moines?

A. Had they not turned south on this road, yes, sir.

Q. And had they kept going west toward Des Moines, you would have followed them on that road, is that correct?

A. That's correct.

Q. But you only went south on this road and to the scene of that body because that's where Captain Leaming went, isn't that correct?

A. Yes, sir, that's correct.

Q. You were going to go there anyway, were you, that particular day; that particular time?

A. No, sir.

Q. In fact, your duty was for security purposes to follow Captain Leaming's car, isn't that correct?

A. That's correct.

The Court: Mr. County Attorney, is there any question but that Officer Jutte found the body through the actions of Officer Leaming and the defendant?

Mr. Blink: No, Your Honor. I see no question.

The Court: That's considered by the Court then to be stipulated that you found the body through the actions of Officer Leaming and the defendant.

By Mr. Wellman:

Q. Were you present when those photographs, I believe they are C and D, were taken, Officer?

Mr. Blink: I don't think he can look at them, Your Honor. Counsel has the photographs.

A. I don't recall if I was present or if I had left shortly before they were taken.

Q. How long were you at the scene before you left, Officer?

A. I would estimate less than 30 minutes.

Q. And were the Ident people there by the time you left, do you recall?

A. As I recall, they had arrived. I don't recall how far they had progressed with their investigation.

Q. Okay. Do you recall who scraped the snow off this body?

A. No, sir, I do not.

Q. Were you present when that was done?

A. If I was present, I did not observe it.

By Mr. Owens:

Q. Agent Jutte, as—

Mr. Blink: Excuse me, Your Honor. For the record, the State would request that examination of each witness on behalf of the defendant be done by one counsel.

The Court: You gentlemen plan to proceed this way throughout all the witnesses?

Mr. Owens: Well, just when we are talking about physical exhibits, Your Honor. It is kind of hard for Mr. Wellman to look at the photographs. I am going to talk about the photographs.

The Court: It sounds fair enough.

Mr. Blink: I have no problem with that.

The Court: Go ahead. I keep forgetting, John.

Mr. Wellman: I do too sometimes.

By Mr. Owens:

Q. Agent Jutte, Exhibit C, that depicts what you maintained was the body with the snow on it, isn't that correct?

A. Yes, sir, that is correct.

Q. Prior to any snow being removed?

A. Yes, sir.

Q. And then it is your testimony that the Ident people got there about 30 minutes after you did?

A. This is an estimate. I can't really be certain of the time period.

Q. Isn't it a fact, Agent Jutte, that someone brushed the snow away from the face prior to even Ident getting there?

A. I have no knowledge.

Q. You didn't do that, did you?

A. No, sir.

Q. And State's Exhibit D, doesn't that show a lot of snow trampled down and wasn't there a lot of people there?

A. Exhibit D does show considerable foot traffic in the area.

Q. And that's—that is with the snow brushed off?

A. It appears to be, yes, sir.

Q. Now, is there anything else different about the positioning of the deceased at that time?

The Court: From what, Counsel?

Mr. Owens: From Exhibit C.

A. The only difference I can observe in the positioning of the body is the removal or partial removal of the snow in Exhibit D.

Q. You mean from the time you observed the body, the leg was in the position that is shown in Exhibit D?

A. Well, from memory, sir, I cannot recall the position of the leg from the photograph of C. I cannot, from this position, I cannot see the leg too well.

The Court: Gentlemen, excuse me. Could we have just a moment. Mr. Reporter, would you take each of these photographs and mark the letter, just the letter alone; A, B, C, D, et cetera on the face of it someplace on a border so that we don't have this constant flopping of these things. And hereafter, if it is feasible, would you mark the things on the face. If you can't mark it on the face, put your tag on the back and follow the same procedure here.

Q. Officer, or Agent Jutte, then when you walked up to that scene depicted in Exhibits C and D, did you see, if you recall, with the snow on it, that leg sticking up in the air in that manner?

A. I cannot specifically recall the leg of the body.

Mr. Owens: I have no further questions.

Redirect Examination

By Mr. Blink:

Q. Officer Jutte, what drew your attention to the body of Pamela Powers?

A. Initially, I noticed a brightly colored striped object of which I later determined to be a blouse or shirt-waist type thing.

Q. Is that depicted in State's Exhibit C?

A. Yes, sir, it is.

Q. Did you ever brush any snow off the face of Pamela Powers?

A. I did not.

Q. Did you ever observe anyone brush any snow off the face?

A. I did not, no, sir.

Q. Was the face exposed when you observed the body?

A. The face, as I recall, was partially exposed when I first observed it.

Q. And is State's Exhibit C a fair and accurate representation of the body of Pamela Powers when you observed it?

A. Yes, sir.

Mr. Blink: No further questions of this witness, Your Honor.

The Court: Gentlemen, anything further?

Mr. Wellman: Just a couple more questions, Your Honor.

Recross-Examination

By Mr. Wellman:

Q. Officer, was it dark at that time?

A. As I recall, it was not dark. No, sir.

Q. Do you have any recollection of any police officers and automobiles using their spotlights?

A. I do at a somewhat later time, yes, sir.

Q. But it is your testimony it was not dark?

A. To my recollection, it was not dark when I initially saw the body.

Q. Now, was it your car, sir, did you shine a spotlight on that culvert area and then start to drive off and were later called back?

A. No, sir.

Q. Did you, while you were present, ever see any car using their spotlights on the culvert area?

A. Yes, sir.

Q. And what officer was that?

A. That would have been a State Patrol Officer, Mr. Wissler.

Q. And that was prior to the body being found, isn't that correct?

A. No, sir.

Q. That was after the body was discovered?

A. That's correct.

Mr. Wellman: I have nothing further.

Mr. Blink: I have nothing further, Your Honor.

The Court: You may step down.

(The witness was excused.)

The Court: Call your next witness.

Mr. Blink: The State would call Wayne—or Carroll Dawson to the stand.

The Court: Mr. Dawson, if you will walk around that thing and come here to be sworn, please.

CARROLL DAWSON,

called as a witness on behalf of the State, having been first duly sworn by the Court, testified upon his oath as follows:

Direct Examination

By Mr. Blink:

Q. Would you please state your name, sir?

A. My name is Carroll W. Dawson.

Q. What's your occupation, sir?

A. I am a captain of the police department of Des Moines, Iowa.

Q. Were you employed as an officer of the Des Moines Police Department on the 26th of December, 1968?

A. Yes, sir. I was a lieutenant in charge of the Identification Section on that date.

Q. On that date, did you have occasion to observe a body which was later identified to be Pamela Powers?

A. Yes, sir, I did.

Q. Could you describe where the body was situated?

A. Approximately one and a half miles south and a mile west of the Mitchellville exit on Interstate 80; a road known to me at that time to be 54th Street and the body was situated in against a cement culvert on the north side of this road.

Q. Were photographs taken of that body?

A. Yes, sir.

Q. Were photographs taken of that body prior to its removal from where it was situated?

A. Yes, sir, they were.

Q. Who physically removed the body from beside the culvert?

A. I did.

Q. Would you describe for the Court how you did that?

A. Yes, sir. Pamela's back was against the cement culvert on the west side of the culvert and she was frozen against the culvert. To back up just a little bit, she was partially covered with snow and after the initial photograph was taken, then we brushed away—I brushed part of the snow and found her to be frozen against the cement culvert. Naturally, her whole body was stiff and frozen. I worked with the body by maneuvering the body back and forth until I was able to break it loose from the cement culvert.

Mr. Blink: No further questions.

Cross-Examination

By Mr. Wellman:

Q. What time did you arrive on the scene, Officer?

A. I went out there approximately 1800 hours or 6:00 p.m. on the 26th of December, '68.

Q. And how many people were present when you got there, if you can recall? How many police officers?

A. There were numerous present. I don't know the exact number, sir.

Q. Okay. Did you take pictures of the body?

A. I did not that date. Sergeant Limke accompanied me and he did take the pictures himself.

Q. He arrived on the scene at the same time you did?

A. Yes, sir. There was three of us that went out there from our section.

Q. And did you go out there in response to a call from someone?

A. We received our call from the dispatcher's office.

Q. Telling you to go out and take pictures of the body that had been found?

A. Yes, sir. Yes, sir.

Q. Okay. Did you have conversations with officers there concerning any removal of snow off that body before you took photographs?

A. No, sir, I did not.

Q. So you have no personal knowledge as to what amount of snow, if any, had been removed from that body before pictures were taken, isn't that correct?

A. That's correct. Yes, sir.

Q. Did you testify at the first trial of Mr. Williams?

A. Yes, sir.

Mr. Wellman: We have no further questions.

Mr. Blink: Nothing further, Your Honor.

The Court: Officer, could you tell from the condition of things whether snow had been removed or brushed off the body before your photographs were taken?

The Witness: It is my recollection, sir, that I had to brush the snow away to actually see the body—the complete body. I don't recollect that there was any snow previously removed.

The Court: Yes. Any further questions?

Mr. Wellman: Do you recall, Officer, when you first came upon the scene whether you could see the face of the body?

The Witness: No, sir, I don't, not without looking at the photographs and from my recollection.

Mr. Wellman: Okay. I have nothing further.

Mr. Blink: Captain Dawson, I would like to hand you State's Exhibit C and ask you if you can tell me what that depicts, if you know?

The Witness: Yes, sir. This is the body of Pamela Powers lying against the cement culvert.

Mr. Blink: Does that fairly and accurately represent what you recall about Pamela Powers' body in the snow when you first observed it?

The Witness: Yes, sir, it does.

Mr. Blink: Can you recall if prior to the taking of that photograph, you had brushed any snow away from the face of Pamela Powers?

The Witness: No, sir. This is the initial photograph.

Mr. Blink: Thank you. No further questions.

Mr. Wellman: Mr. Dawson, do you have any recollection as to how many pictures were taken?

The Witness: Not exactly that night. We went back the next day and photographed the scene in daylight.

Mr. Wellman: Okay. But the body had been removed by then?

The Witness: Yes, sir, it had.

Mr. Wellman: Would it be fair to say that there were more than ten pictures taken of the body?

The Witness: On the scene?

Mr. Wellman: Yes.

The Witness: That night?

Mr. Wellman: Yes.

The Witness: No, sir. I don't believe there was that many taken. Four or five should have covered it, I believe.

Mr. Wellman: We have nothing further.

Mr. Blink: Nothing further, Your Honor.

The Court: You may step down, sir.

(the witness was excused.)

Mr. Blink: The State would call Dr. Jack Hatchitt.

The Court: Doctor, would you get around this board somehow or another and come up here and be sworn, please?

DR. JACK HATCHITT,
called as a witness on behalf of the State, having been first
duly sworn by the Court, testified upon his oath as follows:

Direct Examination

By Mr. Blink:

Q. Would you please state your name?

Mr. Owens: Excuse me, Your Honor.

The Court: Excuse me. Just a minute. Are you
up here on duty?

Bailiff Carstensen: Yes, sir.

The Court: Are you replacing one of the officers?

Bailiff Carstensen: Yes, sir.

The Court: You are not to report or talk to anyone
about what transpires in the courtroom here today.

Bailiff Carstensen: Thank you, sir.

Mr. Blink: Thank you, Judge.

Q. Would you please state your name?

A. Dr. Jack Hatchitt.

Q. And your occupation, sir?

A. Osteopathic physician and surgeon.

Q. Where did you do your—

Mr. Blink: May it be stipulated as to the credentials
of Dr. Hatchitt?

Mr. Wellman: So stipulated for the purpose of this
hearing.

Mr. Blink: Thank you.

A. [sic] Have you ever been a Department Medical Examiner?

A. Yes.

Q. Were you a Department Medical Examiner for Polk County in December of 1968?

A. I was.

Q. In that capacity, did you have an occasion to observe a body later identified to you as being Pamela Powers?

A. I did.

Q. Could you describe for this Court the condition of the body at the time you observed it?

A. Well, when I first viewed the body as it was found before it was moved, it was wedged between the ground and the culvert and frozen. I then helped the—I don't know who it was. There were two or three men down in the ditch with me. We helped take her up the bank.

Q. Was the body frozen stiff at that time?

A. Yes, sir, it was.

Q. Have you seen bodies that are frozen before?

A. Quite often.

Q. You recognize a human body that is in a frozen condition?

A. Yes.

Mr. Blink: I have no further questions.

Cross-Examination

By Mr. Wellman:

Q. How did you get to the scene where the body was located, Doctor?

A. Oh, Dr. Luka had been called and I had just recently moved about a block down the street from him, so he called me and asked me if I would drive him to the scene.

Q. I presume Dr. Luka had been called by the police, do you have any knowledge of that?

A. No, I have no knowledge.

Q. What time did you get there, Doctor?

A. Oh, I have no knowledge. I just drove. I didn't take any notes on it. It was not my case, so I just didn't—

Q. Were there police officers present when you arrived?

A. Yes, there was. Officers directed us to the scene.

Q. Was it light or dark, do you recall?

A. It was getting dark, I believe. And it was snowing at this time.

Q. And it was snowing?

A. Yes.

Q. Do you recall light snow, heavy snow?

A. Light snow. It later, in the evening, became heavy. We later drove from that scene out to the home of the parents and it was snowing quite heavily by that time.

Q. So shortly after you left the scene ,it was snowing quite heavily? Is that a fair statement?

A. By the time it took us to get from Mitchellville to Urbandale it was quite heavy.

Q. And how long were you at the scene where the body was located?

A. Oh, approximately half an hour, 45 minutes.

Mr. Wellman: I have nothing further.

Mr. Blink: We have nothing further, Your Honor.

The Court: You may step down.

(The witness was excused.)

Mr. Blink: Excuse me, Your Honor.

(At this time a short discussion was held between counsel.)

Mr. Blink: Would you mark these exhibits, please?

(At this time State's Exhibits F and G were marked for identification by the court reporter.)

The Court: Herman, this is a closed hearing so you shouldn't reveal anything that takes place in here today.

Bailiff Hansen: Yes, Your Honor.

Mr. Blink: Your Honor, we now have two exhibits marked F and G purporting to be local climatological data obtained through the United States Department of Commerce setting forth a substantial amount of weather recordation and so forth, including precipitation, temperature—mean temperatures, wind and so forth. At this time, we would ask that it be stipulated that they are fair

and accurate; that the Court take judicial notice of them and that they be admitted into evidence.

Mr. Owens: We are talking about the months of December and January?

Mr. Blink: That's correct.

Mr. Owens: December 1968 and January 1969?

Mr. Blink: '69, that's correct.

Mr. Wellman: So stipulated.

The Court: Very good. Proceed.

Mr. Blink: Your Honor, the State would call to the stand Tom Ruxlow.

THOMAS RUXLOW,

called as a witness on behalf of the State, having been first duly sworn by the Court, testified upon his oath as follows:

Mr. Blink: Would you mark these, please?

(At this time State's Exhibits H and I were marked for identification by the court reporter.)

Mr. Blink: I would like the record to reflect that we now have two additional exhibits marked I and H; that Exhibit H is a map of Poweshiek County obtained from the Iowa State Highway Commission and the United States Department of Commerce and that Exhibit I is obtained from the same source, but concerns itself and depicts Jasper County, Iowa.

I believe the record should also reflect that copies of these maps have previously been provided to defense counsel.

Direct Examination

By Mr. Blink:

Q. Would you please state your name?

A. Thomas R. Ruxlow.

Q. And what is your occupation, sir?

A. Assistant Director with the Iowa Bureau of Criminal Investigation.

The Court: Spell your name, please?

The Witness: R-u-x-l-o-w. Ruxlow.

Q. How long have you been employed in the capacity that you presently have?

A. I have been employed by the Bureau of Criminal Investigation for approximately ten years.

Q. Were you so employed on the 26th of December, 1968?

A. I was.

Q. On that date, did you have occasion to go to Grinnell, Iowa?

A. Yes, I did.

Q. Why did you go to Grinnell, Iowa?

A. I received a radio message through state police radio communications to meet Special Agent Mayer in Grinnell on — at 8:00 a.m. on December 26.

Q. What was the purpose for this meeting?

A. To organize and search for Pamela Powers.

Q. Prior to that time, had you had any discussion with Officer Leaming of the Des Moines Police Department?

A. No, sir.

Q. Had you had any discussion with Mr. Williams, the defendant?

A. No, sir.

Q. Would you state whether or not you were at that time aware that clothing and articles had been found in a rest area near Grinnell?

A. Yes, sir, I was.

Q. How was this search organized?

A. When we arrived in Grinnell, an appeal was made through the local radio station for volunteers to help in the search for Pamela Powers. I was assigned the task of organizing this search and directing its operations.

Q. Do you recall, approximately, how many volunteers were at your disposal for that, sir?

A. Yes, we had approximately 200 volunteers.

Q. Two hundred volunteers. Now, how did you specifically organize an area to be searched?

A. We obtained the two highway maps of Poweshiek and Jasper Counties and they were marked off by myself in a grid fashion. The grids were then reproduced on a smaller scale map provided to the teams. The volunteers were divided up into teams consisting of anywhere from

four to six people per team and assigned to search specific grids.

Q. Is the grid fashion or the grid method of search one which is commonly used in your profession?

A. Yes, sir, it is.

Q. Have you had experience in using that type of search in your business?

A. Yes.

Q. Where was the control center for this search?

A. The control center was at the Grinnell Police Department.

Q. Were the searchers instructed of anything prior to their commencing their actions?

A. Yes, prior to assigning geographical areas in reference to the grid, the searchers were instructed, that when searching, to check all the roads, the ditches, any culverts; they were instructed to get down and look into any culverts. If they came upon any abandoned farm buildings, they were instructed to go onto the property and search those abandoned farm buildings or any other places where a small child could be secreted.

Q. Now, specifically, what areas were to be searched?

A. The areas to be searched was approximately seven miles north and seven miles south of Interstate 80 in Jasper and Poweshiek County.

Q. Why those two counties?

A. Being that the clothing was found at the Grinnell rest area, and it was surmised that the clothing would probably be one of the last articles to be removed and so the area was—the search was concentrated in Poweshiek and Jasper Counties.

Q. Was there a specific direction that the search was to take?

A. Yes. First of all, the search was to be concentrated in Poweshiek County, then into Jasper County, and then westward from Jasper County into Polk County.

Q. Was Polk County to be searched?

A. Yes.

Q. Approximately what time did this systemized search begin?

A. Approximately 10 o'clock on December 26th.

Q. Was this intended to be an around-the-clock search?

A. Yes.

Q. Now, was this systemized search suspended?

A. Yes.

Q. Approximately what time?

A. Approximately 3:00 p.m. on December 26th.

Q. That would be five hours after it commenced?

A. Yes, approximately.

Q. At the time that the search was suspended, how far west had the search progressed?

A. To the county line bordering—well, it would be the west county line of Jasper County as it borders Polk County.

Q. As a specific area was searched and covered, were the searchers reassigned to new areas?

A. Yes, they were.

Q. Did you make an indication on the map, which are now Exhibits H and I, of which areas were searched?

A. Yes. The areas were checked off by myself.

Q. Approximately how many square miles were in fact searched prior to the time the search was suspended?

A. Approximately 510 square miles.

Q. Did the weather conditions at that time inhibit the search?

A. No, sir.

Q. Are State's Exhibits H and I the actual maps that you used at the time?

A. They are.

Q. Now, Mr. Ruxlow, on the 26th day of December, 1968, did you have occasion to observe a body which was identified as that of Pamela Powers?

A. Yes, I did.

Q. Where did you observe that body, sir?

A. Approximately a mile south and one and a half miles west of Mitchellville.

Q. Mitchellville exit?

A. Yes.

Q. Last week, did you have an opportunity to be present when aerial photographs were taken of that vicinity?

A. Yes, I was.

Q. I hand you what has been marked State's Exhibits A and B and ask if you can identify what those photographs depict?

A. Yes. State's Exhibit A is a colored photograph showing a view looking west of the, I think it is 58th Street and the location of the culvert where the body of Pamela Powers was found.

Q. How about Exhibit B?

A. Exhibit B is a photograph looking in a southerly direction, showing a close-up view of the culvert where the body of Pamela Powers was found.

Q. Are those fair and accurate representations of what they purport to show?

A. Yes, they are.

Q. Based upon your recollection and your observation of those photographs, would you look at State's Exhibit E?

A. (Witness complies.)

Q. And tell me whether or not the circle which is depicted on State's Exhibit E is the correct location of where the body was found?

A. Yes, that is the location.

Q. Now, is that in Polk County, Iowa?

A. Yes, it is.

Q. Now, what relation, geographically, did the point where the body was found correspond to the westernmost portion of your search?

A. It is approximately two, two and a half miles west of the furthestmost point that had been searched on the 26th.

Q. How was Polk County to be searched?

A. The same method that the Poweshiek and Jasper Counties were searched. Seven miles north and south, approximately, of the Interstate working in a westward direction.

Q. Were the same instructions as to the objects to be searched present as far as Polk County as were present as Jasper and Poweshiek?

A. Yes, these instructions were to apply to that area also.

Q. Now, is it—it is correct, isn't it, that you did not in fact grid out Polk County to be searched?

A. I believe I had a Polk County map. It was not included with the report because we didn't get to it.

Q. Would the location where the body of Pamela Powers was found have been included in the grid search?

A. Yes, it would have.

Q. And would that have been the easternmost grid to be searched in Polk County south of the Interstate?

A. Yes, it would have.

Q. Would that area have been searched?

A. Yes.

Q. What was the approximate rate of the search?

A. The approximate rate was approximately a hundred square miles per hour.

Q. Mr. Ruxlow, based upon your recollection of the facts and your organization of the search and your experience, do you have an opinion as to when the location or the Powers body would have been searched?

Mr. Wellman: We are going to object to that as the issue for the Court to determine and I don't believe this man has qualified himself as an expert to give that.

The Court: You are asking him to estimate the time that the particular area where the body was found would have been covered by their search had the search not been canceled?

Mr. Blink: Well, that's correct.

Mr. Wellman: He asked—

The Court: Maybe, excuse me, I will have the reporter read the question back.

(At this time the last question was read back aloud by the court reporter.)

Mr. Blink: I will rephrase the question.

Q. The search was disbanded or suspended at approximately 3:00 p.m., is that correct?

A. That's correct.

Q. Had the search continued at its existing rate, approximately, how much later would the area where the Powers body was found have been searched?

A. Approximately three to five hours.

Q. Do Exhibits H and I fairly and accurately represent the grids that you set forth on them?

A. Yes.

Q. Did you, in fact, set forth those grids on them?

A. Yes, I did.

Q. Did you, in fact, check them off?

A. I did.

Q. Did you have an opportunity to see the body of Pamela Powers before it was removed from beside the culvert?

A. Yes, I did.

Q. I would like to hand you what has been marked State Exhibit C and ask you if you can tell we what that depicts, if you know?

A. That depicts the position of which the body of Pamela Powers was discovered on the culvert on 58th Street in Polk County.

Q. To the best of your recollection, at the time that this picture, this picture would have been taken, had any snow been brushed away from the face of the child?

A. No.

Q. How long did you remain at the scene?

A. Two or three hours.

Q. I hand you what has been marked State's Exhibit D and ask you if you can tell me what that depicts, if you know?

A. That's the same culvert as in State's Exhibit C. This is taken a little further away and it shows the, once again, the body of Pamela Powers on the west side of the culvert on the north side of the road.

A. [Sic] Has snow been removed or trampled down as indicated in State's Exhibit D?

A. No. That's exactly the way it was found.

Mr. Blink: Your Honor, at this time the State would offer into evidence Exhibits A through E and H and I.

The Court: Everything is in except H and I, isn't it, gentlemen?

Mr. Owens: H and I being the maps, Your Honor?

The Court: Yes, sir.

Mr. Owens: Yes, it is as I understand.

The Court: Any objections?

Mr. Owens: Nothing had been offered. The photographs haven't been offered.

The Court: Oh, excuse me. They have not been stipulated. A through E and—through I then, excuse me.

Mr. Blink: F and G, Your Honor, I believe have been stipulated.

The Court: Gentlemen, A through I, any objections?

Mr. Wellman: No objections.

Mr. Blink: I have no further questions on direct, Your Honor.

Cross-Examination

By Mr. Wellman:

Q. Sir, do you presently work with the B.C.I.?

A. Yes, I do.

Q. And what is your title?

A. Assistant Director.

Q. And what was your title back in December of 1968?

A. Special Agent.

Q. What time did you come upon the scene where the body was located?

A. Approximately 5:45.

Q. And how many officers were present when you came upon the scene?

A. It was myself, Special Agent Mayer, Special Agent Jutte, Captain Leaming, one other Des Moines officer. I believe an Iowa Highway Patrolman, Wissler.

Q. And who came upon the scene first?

A. Who found the body first?

Q. Yes.

A. Special Agent Jutte.

Q. And how long after he had discovered the body did you see it?

A. A matter of minutes.

Q. Now, was it light out or dark out at that time?

A. It was about dusk.

Q. About dusk?

A. Uh-huh.

Q. You are saying it was not dark then at that time?

A. No, sir.

Q. Now, you say that there were perhaps 200 volunteers in this search?

A. Approximately, yes.

Q. And you helped organize that search?

A. Yes.

Q. Okay. And what time was the call put out for volunteers over the Grinnell radio station?

A. Shortly after 8:00 a.m.

Q. And where did they assemble?

A. At the Grinnell Police Department.

Q. And what did you do when a volunteer would come into the police department?

A. Well, first of all, we waited until we had a large group of them and then we separated them as I previously testified and as to the method of searching and then,

they were broken into teams, depending upon the vehicles that they had available to them at that time; snowmobiles, pickups or four-wheel vehicles and then they were dispatched to the particular geographical location and search area.

Q. Did you take their names?

A. I had a list, yes.

Q. Is that list still available?

A. No, sir, it is not.

Q. And is there a reason for that?

A. It was in my original notes and those have since been destroyed.

Q. Why would your original notes be destroyed?

A. Over a period of ten years, Bureau rules, we keep our original notes for—until after all the appeals in the state courts and then, I destroyed them when I moved to Des Moines.

Q. You mean the B.C.I. has a policy that when a case has gone to the Iowa Supreme Court and no further, that things are destroyed?

A. The officers' notes, after they have been dictated into the report, can be destroyed after a period of approximately three to four years.

Q. Okay. How about the report?

A. The report is still in existence.

Q. But would that indicate the list of names?

A. No, that did not.

Q. Would it indicate the total number of volunteers?

A. Yes, it did.

Q. Do you have that report with you?

Mr. Blink: If the Court pleases, defense counsel has a copy of that.

Q. Now, tell us how you would assign different people to different locations.

A. Depending upon the—well, if, for example, three or four friends came in together, they would be assigned in a team. And depending on what area would be searched, we assigned people with snowmobiles to search the median and ditches along Interstate 80 and they would be assigned a geographical area and after the completion of that search, they would report back either in person or by phone and then be assigned to another geographical location.

Q. Now, what were the weather conditions at this time; at 10:00 a.m., if you recall?

A. It was bright. A little precipitation, if any.

Q. So people, with regard to the median or ditches along Interstate 80, they were to ride snowmobiles—

A. Yes.

Q. —or motor vehicles, they weren't to walk those areas?

A. No, they rode snowmobiles.

Q. About how many people with snowmobiles did you have?

A. I don't recall the exact number now.

Q. Do you have any idea how fast they would go in that type of a search?

A. Yes, I do.

Q. And how fast was that?

A. They were going at that particular time faster along the median and the ditches of Interstate 80 than the motor vehicle traffic was on the highway because of the road conditions.

Q. So they were going rather fast; 25, 30 miles an hour?

A. Yes—I don't know. I couldn't answer that. I wasn't there.

Q. Well, tell me with regard to a side road, a road that either led from Interstate 80 or was an east and west gravel road that would parallel it, how were those types of roads to be searched?

A. Sometimes they were searched by snowmobiles. Sometimes they were searched by motor vehicles. Upon finding a culvert that went underneath the road, the searchers got off and went down and checked the culverts.

Q. You mean they got down and looked into the culverts?

A. Yes, sir.

Q. That's what they were instructed to do?

A. Yes. And that's the reports I was getting back also.

Q. Okay. With regard to a ditch on either side of the road that I have posed in my hypothetical, a typical country gravel road, no one was searching those ditches?

A. They were searching from the vehicles.

Q. Just visual, driving along and looking into them?

A. Yes.

Q. There was nothing like anyone walking through the various ditches at this time?

A. No, not unless the ditch was inaccessible of observation from the road; then they would get down and go into the ditches.

Q. And you were looking then, I guess, for a visual body; a body that would not have been covered by anything?

A. We were searching for anything that would be visible from the road. And if it—you couldn't see into the culvert, you were to get down and go into the culvert or any outbuilding of an abandoned farm.

Q. How about the ditches if they were weeded?

A. They were instructed to get down and go through that.

Q. You told us before that you said you had searched approximately 540 square miles?

A. Yes.

Q. Now, your report doesn't indicate that, does it?

A. No. The report indicates something like 180 square miles in Poweshiek County. That's inaccurate.

Q. Why would that be inaccurate?

A. I am not sure. I think what happened is I estimated it at that time and I have since refigured it by actually measuring the map and the figure is inaccurate.

Q. How about Jasper County?

A. That's fairly accurate.

Q. Do you know how far across Jasper County is?

A. It is—

Q. From east to west?

A. Jasper County, I would have to measure it again.

Q. You couldn't give us a rough estimation at this time?

A. Not without a ruler.

Q. It would be more than 20 miles from east to west, wouldn't it?

A. Yes.

Q. Okay. And in this report, you say you covered—what was it you say you had covered; 208 square miles in Jasper County in your report, didn't you?

A. Yes.

Q. Pardon me?

A. Yes.

Q. Okay. If you were searching seven miles either side of the Interstate, that would be north to south, you were searching 14 miles, isn't that correct?

A. I said that would be approximately. Sometimes it was in excess of seven miles. Sometimes it was a little less than seven miles.

Q. Okay. But if we were to approximate, can we accept that figure of seven miles either side as an average?

A. Approximately, yes.

Q. So that would be 14 miles north and south from the Interstate and if Jasper County were only 20 miles from east to west, that would be 280 square miles, wouldn't it?

A. I'm not sure.

Q. Fourteen times 20.

A. Before I answer a question, I would want to measure the map and refigure it. If you would like to have me do so—

Q. Well, I certainly would if we have a ruler.

The Court: There is one in my desk drawer in the center.

A. Jasper County is approximately 30 miles east or west.

Q. Okay. So then if we took 30 times 14, that would be 420 square miles, would it not?

A. Yes, but it is not quite seven miles north and south of Interstate 80. Some areas it was two, two and a half miles. Some areas it would be six miles, some areas would be even further than that seven miles.

Q. Well, what would distinguish?

A. The particular geographical location.

Q. Now, Officer, did you make any record of when volunteers—did all the volunteers work from 10:00 to 3:00?

A. Yes. I kept a log of the list of all the volunteers.

Q. Why was the search called off at 3:00?

A. I was instructed to—myself and Special Agent Mayer was instructed to meet Captain Leaming at the Grinnell truck stop there at approximately 3 o'clock. We went out and met with him and then we were instructed to follow him to Des Moines.

Q. But why would that cause you to call off the search?

A. Because we, the Bureau personnel, were the only ones that were conducting the search and, therefore, there was no one else left there to continue on. The search was suspended at that time.

Q. Well, the volunteers were there, weren't they?

A. That's correct, they were.

Q. And you simply could have given them directions as to where to go, could you not have?

A. No, because there wasn't any police officers there to assume my position of coordinator of the search.

Q. Do you mean that you could not have gotten anyone else from the B.C.I. or from the sheriff's department or from the Grinnell Police Department to conduct the search?

Q. Grinnell Police Department personnel were handling their routine business, as well as searching the outer perimeters of Grinnell. The sherriff's office was doing likewise.

Q. What was the weather condition at 3 o'clock?

A. As I recall, it was bright out, chilly, cold.

Q. Well, how did you communicate to the volunteers, these 200 people, that the search was just going to quit at 3 o'clock?

A. Well, everything was left in motion at that time to complete and we left—actually pulled up stakes and left the search as it was in progress.

Q. Now, was this—had you not gotten that call, how long did you plan to conduct the search?

A. As long as the volunteers would hold out.

Q. Well, how would they do this in the dark, sir?

A. With flashlights and such.

Q. Would—do you think that would slow them down a little?

A. Yes, it would.

Q. And how about if it was bad weather; if it was snowing?

A. It all depends on what degree of bad weather, which I can't speculate at this time.

Q. Were there flashlights around to equip the volunteers with if they were to work in through the night?

A. No, the volunteers had their own.

Q. Well, did they have it at that time when they came during the day?

A. I don't recall.

Q. Do you recall just one name of any volunteer that worked with you at that time?

A. No. I don't.

Q. Was anything found as a result of this search?

A. Oh, several incidental things that were brought in that proved to be not pertinent to the investigation.

Q. Right. Nothing involved in this case?

A. That's correct.

Q. But some things were located and brought back to the headquarters by various volunteers?

A. Yes, uh-huh.

Q. Do you have any idea how many culverts there were in the area that you conducted the search over?

A. I have no idea.

Q. Are they located on these maps that you have?

A. The culverts?

Q. Right.

A. No.

Q. Well, then it is possible, isn't it, sir, to just drive down a road and not see a culvert, wouldn't that be possible?

A. It might be possible.

Q. If you could not direct the volunteers to, by your grids and maps, where various culverts were, then it was just up to their visual observation to determine that, isn't that correct?

A. That's correct.

Q. And as it got dark, then, of course, it would make it much more difficult to see any particular culvert, isn't that correct?

A. It all depends on the kind of culvert. I can't speculate on that.

Q. Right. Okay. Is it true that the most you can tell us is how you instructed people to conduct the search as opposed to knowing exactly how the various volunteers did conduct the search?

A. No. I actually received reports back from various highway patrolmen, sheriff's deputies, that the volunteers were doing an excellent job of getting out of their vehicles, getting down, actually crawling into culverts to check them out.

Q. All 200 volunteers?

A. Not all 200.

Q. Now, would you characterize this in the manner you have described it as a thorough-type search—

A. I believe so.

Q. —as opposed to a rather cursory one?

A. Thorough in respect to the geographical area covered in a systematic search.

Q. Have you been involved in any of these type of searches recently?

A. Yes, uh-huh, not exactly of this same nature, but similar-type searches.

Q. Were you involved in the search for—okay, like Mrs. Holliday from Grimes, Iowa recently?

A. No, sir. No, sir.

Q. You have told us that the search was called off at 3:00 because you were ordered somewhere else, isn't that correct?

A. That's correct.

Q. When would it have been resumed?

A. I can't say because it was never resumed.

Q. Well, why wasn't it?

A. Because the body was found; the object of the search was discovered.

Q. But you didn't know that at 3 o'clock when it was called off, did you?

A. No.

Q. Now, let's presume the body had not been found, do you have any idea of when the search would have been continued?

A. I'm sorry. Would you repeat the question?

Q. You called off the search. The search was stopped at 3 o'clock on the 26th, isn't that correct?

A. That's correct.

Q. And do you remember what day of the week that was?

A. No, sir, I don't.

Q. Well, I think we can get that to the Court later, but presuming the search may not have started again until the next day, isn't that correct?

A. I have no way of knowing. It could have started up within a couple of hours; three hours, it could have started up the next morning. There is a lot of variables.

Q. How would you have reassembled the volunteers?

A. Put out another call for them.

Q. But by then it would have been dark, wouldn't it?

A. See, the volunteers were still out searching at the time I left the Grinnell area. They were still out conducting searches and they were still—some of them had assembled yet to await for further instructions. Some groups were still at the police department when I left.

Q. Well, you have no idea then when the search might have restarted?

A. I have no way of knowing. We never even considered restarting it after we found Pamela Powers.

Q. Okay, but that was at quarter to five—

A. That's correct.

Q. —or a quarter of six?

A. Yes.

Q. That was almost three hours after you had abandoned the search, isn't that correct?

A. Yes.

Q. Now, during that time period, did you ever have any idea of resuming the search?

A. No, sir.

Q. Why not?

A. Because we were en route to Des Moines and I was waiting further instructions at that time as to the next assignment.

Q. If the 27th of December was a Monday, you would have substantially fewer volunteers, isn't that correct?

A. I have no way of knowing how many volunteers we would have gotten on a specific date.

Q. Well, from your experience in doing these types of searches, do you have more volunteers on weekends than you do during a workday?

A. It is difficult to say. It all depends on the nature of the request; the type of case you are involved on, the public appeal it has. There is a lot of variables there that enter into it.

Q. Okay. You have told us that when you left, some volunteers were still out in the field conducting searches, is that correct?

A. Yes, that's correct.

Q. When they reported back to headquarters was there anyone there to give them further instructions?

A. No.

Q. Were they given any instructions?

A. Not to my knowledge.

Q. Were they told to go home?

A. I have no way of knowing.

Q. Just no one was there—

A. That's correct.

Q. —in an official capacity, isn't that correct?

A. There could have been someone from the sheriff's office there, I am not sure.

Q. Well, did you leave him any instructions as to what to tell the volunteers?

A. I told them that we were—let me think just a minute here. I think the sheriff from Poweshiek County was there. I think we told him something to the effect that we had to go right now, but we would be back.

Q. And what is his name?

A. Max Allen.

Q. Do you think you told him that?

A. Yeah, because he was working with us at the control center.

Q. Well, didn't you tell him when you would be back?

A. No, I had no way of knowing.

Q. Before, I asked you if any of the Grinnell police or sheriff's department or highway patrol or other B.C.I.

officers could come and take over direction of the search and you told me no, didn't you?

A. Yes, nobody did take over the search.

Q. Could the sheriff have done that?

A. He didn't.

By Mr. Owens:

Q. Officer Ruxlow, concerning this map you have in front of you, these maps--

A. Yes.

Q. Exhibits I and H, when did you put in the red portion on these maps?

A. When I graphed out the area.

Q. When did you do that?

A. On the 26th.

Q. Of what day?

A. Twenty-sixth of December.

Q. That's not the map you used on the 26th of December, is it?

A. Yes.

Q. Well, why does it have the date--this is the same map you used on those dates?

A. Yes.

Q. Now, wherever you see a check, like where it says 11C--

A. Yes.

Q. —what does that check mean?

A. It means that the area has been searched.

Q. And who would tell you it was searched?

A. The person that was put in charge of that team.

Q. In other words, you had team leaders, is that correct?

A. Yes.

Q. You don't remember any of those team leaders?

A. No, it has been ten years, Counselor.

Mr. Wellman: We have nothing further at this time.

Mr. Blink: I have nothing further, Your Honor.

The Court: Officer, when you left at 3 o'clock, did you have the understanding that you were coming up on the automobile that was carrying the defendant back to Des Moines?

The Witness: Yes, we had met with them at the truck stop in Grinnell, at the interchange.

The Court: What was your state of mind as to whether you were likely to be led to the body?

The Witness: I was under the impression that there was a possibility that we could be led to the body at that time.

The Court: Gentlemen, anything further?

Mr. Owens: Who gave you that impression?

The Witness: Captain Leaming.

Mr. Owens: No further questions.

Mr. Blink: Nothing further, Your Honor.

The Court: You may step down, sir.

(The witness was excused.)

Mr. Blink: Your Honor, at this time I would like to ask for a recess in accommodating one of my witnesses who has to travel some distance to get here.

The Court: Gentlemen, could we have our mid-morning recess at this time?

Mr. Owens: Yes, Your Honor.

The Court: I just suggest, gentlemen, that you stay in the room, but you may use your own judgment on that.

(At this time a short recess was taken.)

The Court: Proceed, gentlemen.

Mr. Blink: Your Honor, the State would call Dr. Earl Rose to the stand.

The Court: Would you try to get around that blackboard some way or another.

DR. EARL ROSE,

called as a witness on behalf of the State, having been first duly sworn by the Court, testified upon his oath as follows:

Direct Examination

By Mr. Blink:

Q. Would you please state your name for the record?

A. Earl Forrest Rose. R-o-s-e.

Q. And what is your occupation, sir?

A. I am a physician.

Mr. Blink: Can we stipulate to the credentials of Dr. Rose?

Mr. Wellman: Just ask him where he got his training.

The Court: Excuse me. Young man, did you just leave those things downstairs with the clerk?

Robert Rigg: Yes, sir.

The Court: Do not leave them very long.

Robert Rigg: No, I was going to get them.

The Court: Excuse me for interfering.

Mr. Blink: That's all right.

Q. Dr. Rose, what is your area of endeavor?

A. I am a pathologist by specialty.

Mr. Wellman: We will stipulate to his credentials.

Q. Dr. Rose, where are you presently employed?

A. I am employed by the University of Iowa at the College of Medicine.

Q. Doctor, could you tell us what the effect—strike that. Could you tell us what decomposition of a body entails?

A. Decomposition of the body is the breakdown of the body. It entails both the digestion or the lysis, l-y-s-i-s, which means dissolving of the body by our own en-

zymes that are in our system; in ourselves and also by breakdown of the body by bacterial enzymes or enzymes from the bacteria that are in our bodies and are released and generally disseminate throughout the body at the time of death.

Q. What is the effect of cold upon decomposition?

A. Generally speaking, the effect of cold is to slow down, to delay or to halt the effect of these enzymes on the body dependent on the degree of the cold.

Q. What is the effect of freezing or subzero temperatures upon decomposition?

A. That will cause a cessation of these enzymatic actions and, therefore, the breakdown of the body thus preserving the body.

Q. Doctor, if you would assume the following for me: That we have the body of an approximately ten-year-old girl; that it is frozen at approximately 5:45 p.m.; that it is partially clad in clothing; that it is in a subzero temperature at 5:45 p.m. and remains in the subzero temperature; that there is a slight trace of precipitation of less than an inch in its exposure to the exterior elements and the body in that condition is found three to five hours later. Do you have an opinion as to the effect that would have upon decomposition of the body?

A. Yes, I have an opinion.

Q. Okay. What is that opinion?

A. My opinion is that no further decomposition would take place until the temperature was elevated to

that degree where enzymatic action and decomposition would take place.

Q. Would such a body have been preserved to the extent that a normal examination or routine postmortem could have been performed?

A. Yes, after the body was thawed to permit this type of examination.

Mr. Blink: I have no further questions.

The Court: Gentlemen, you indicated you wished to defer cross-examination until this afternoon, is that still your wish?

Mr. Wellman: That would be our preference. I feel we have to wait until after we have our consultation.

The Court: Counsel, I need to ask you a question. In order to understand your point, I will have to understand your question. I seem to be hearing you say that you started out at 5:45 p.m. and that the body was found three hours later?

Mr. Blink: Oh, excuse me, Your Honor.

The Court: Did you say such a thing, Counselor?

Mr. Blink: For clarification's point, the Court is correct as far as—my statement was in error.

The Court: Perhaps you can rephrase your question.

Mr. Blink: I will, Your Honor. You are correct.

Q. Doctor, we also add the following fact: That, although, the body—

The Court: Excuse me, Counsel. If you add to what I don't understand already, I still mean—perhaps I am not understanding your question.

Mr. Blink: The intent, Your Honor, is to demonstrate that the body, in its frozen state—

The Court: Counsel, you haven't understood me at all. I just don't understand your question to the doctor. Now, if you add to that misunderstood question, I don't understand the total either any more than I do this part, you see? I would like to suggest that you rephrase it, because I don't understand the hypothetical question that you put to the doctor.

Mr. Blink: Do you desire the State to go with the initial premise for this hypothetical, Your Honor?

The Court: Counsel, I don't desire anything. It is not desire that counts, I simply want to inform you that I must make rulings on this and I have got to understand your question and I don't understand the question of 5:45 and then three hours later. I don't understand that at all.

Mr. Blink: Well, I—

The Court: You could certainly stand on your record, of course, if you wish.

Mr. Blink: No, Your Honor. I guess that confusion is present on both my part as well as the Court's as far as you're concerned. We have indications that, in the record, the body was found.

The Court: Counsel, I am not going to allow you to argue your question now.

Mr. Blink: I don't intend to, Your Honor.

The Court: You don't need to do anything if you don't want to. I am just telling you I make my rulings on what I hear, not on what you meant because I don't know what that is.

Mr. Blink: Very good, Your Honor.

(By Mr. Blink, continuing)

Q. Doctor, you had an opportunity to observe and read the climatological data for the months of December 1968 and January through April of 1969, is that correct?

A. Yes, I have.

Q. And you have stated that a body which is frozen would inhibit decomposition of the body?

A. Yes, sir.

Q. Now, assuming that a body is in a frozen condition at approximately 3:00—excuse me, 5:45 p.m. on the 26th of December, 1968, and that subzero temperatures existed throughout the balance of the month of December. Do you have an opinion as to whether or not had the body been found at a later time during December of 1968, whether decomposition would have been substantially altered so as to preclude a later autopsy?

A. Yes, I have an opinion.

Q. What is that opinion?

A. It is my opinion that if the body were frozen at 5:45 p.m. on December 26, 1968, and if the freezing conditions as demonstrated by the local climatological data that was supplied to me is correct, it is my opinion that no substantial alteration in the body would have taken

place during the remainder of the month of December being of substantial alteration in the body that would have significantly or materially altered the body to change its availability or condition for the performance of a post-mortem examination.

Those conditions, from looking at these records, it is my opinion, would probably have prevailed until the month of April; at which time there was an extended period of elevated temperatures, many of which were above 50 degrees Fahrenheit.

Q. Now, the climatological data also indicates that on the 25th day of December, 1968, subzero temperature was existent throughout that date.

A. Yes, sir.

Q. If we assume that the body was in a frozen condition at 3:00 p.m. on the 26th of December, 1968, and that the body is found between three and five hours after that, which would be between 6:00 p.m. and 8:00 p.m. on the 26th, would the body have been preserved to the extent that a normal postmortem could have been performed?

A. Yes, I think so. Of course, after thawing out. May I add to that?

Q. Yes.

A. But a postmortem could have been performed all the period of time until the body thawed out, unless there was destruction by some other force.

Q. Would the hairs of the body have remained in substantially the same condition?

A. Yes, it is my opinion they would have.

Mr. Blink: Would you mark these exhibits too?

(At this time State's Exhibits J, K and L were marked for identification by the court reporter.)

Mr. Blink: Your Honor, we now have marked as State's Exhibits J, K and L the climatological data for the months of February, March and April of 1969; and we would ask that those be stipulated as fair and accurate and offer them into evidence.

Mr. Wellman: So stipulated.

The Court: Counsel, I don't understand. Are these weather records that the doctor has been referring to in his testimony?

Mr. Blink: Yes, Your Honor.

The Court: Do you have any further questions, Counsel?

Mr. Blink: No, Your Honor, I don't.

The Court: Do you gentlemen wish to cross-examine?

Mr. Wellman: Well, we might save some time, Your Honor, if I could initially get into it.

The Court: Fine.

Mr. Wellman: There might be a situation where we need not call him back.

The Court: Fine. Proceed.

Cross-Examination

By Mr. Wellman:

Q. Now, Doctor, has the Medical Examiner's report concerning a body found on December 26, 1968 been provided to you?

A. Yes, it has.

Q. And that was done by Dr. Luka?

A. No.

Q. Pardon me?

A. No.

Q. I mean the Medical Examiner's report was done by a Dr. Leo Luka, is that correct?

A. Oh, yes, sir. I am sorry. Yes, I thought you meant was it provided by Dr. Luka. I apologize.

Q. Have you refreshed your recollection of that report before taking the stand today?

A. I looked at it, yes, sir.

Q. Okay. Now, of course, when that body was found at a quarter of six, 5:45 p.m., on December 26 and Dr. Luka looked at it shortly thereafter and took it to the morgue, he made one observation concerning the face of the body. Do you recall what that was with regard to the gathering of blood in the face making it dark appearing?

A. I believe that you are alluding to the fact that he said it was cyanotic or blue?

Q. Yes. Okay. Would that condition have existed through the month of December because the body was frozen?

A. I think that this would have persisted until the body was thawed out, yes, sir.

Q. Now, say that body had remained frozen, let's say, for 48 hours from the 26th, say, it was found on the 28th.

A. Uh-huh.

Q. You are telling us that that condition would still have existed?

A. Yes, sir. It is my opinion the cyanosis would still have persisted.

Q. But would the interpretation of that condition be the same? In other words, Dr. Luka said that that was probably an indication of suffocation or strangulation. Do you recall that?

A. I believe that he did interpret it that way, yes.

Q. But 48 hours later in a frozen condition, one observing that, could that condition be attributed to the freezing itself?

A. I would not attribute it to the freezing, sir.

Q. Is what you are telling us that the freezing of the body itself would not have altered the condition of the body as it was found on December 26?

A. I think it could have preserved the condition of the body.

Q. Okay. With regard to samples taken by Dr. Luka from the rectal and vaginal area of the body, which he concluded contained acid phosphatase, would that condition have existed until the body thawed?

A. Yes, I think that those would have been preserved as well, sir, because if we are dealing with enzymatic activity with bacteria also, it applies for enzymatic activity of other areas equally.

Q. Now, you noted in the report that this only contained acid phosphatase and no spermatazoa—

A. Yes, sir.

Q. —and not the usual sperm, if it was seminal fluid. But if that fluid showed positive for acid phosphatase, then the sperm would have been preserved also?

A. I believe they would have, yes, sir.

Q. Now, in 1968, Doctor, at that time was it possible, once the test is performed, to show acid phosphatase; could it have been measured in international units at that time?

A. I don't recall in 1968 that—I think it was very frequently reported as positive and negative by many laboratories and was not measured in the units by the—

Q. But today in that situation, it would be measured in international units, isn't that correct?

A. We would like to have it measured in units, yes, sir.

Q. And, of course, if it is done that way, then you can get some idea of the time that the—if it was seminal fluid—was put into the body?

A. There has been one report to the effect that time intervals can be determined from that. This—but I have no experience with that particular aspect of determining

a time interval based on the decay or deterioration of acid phosphatase, so I would be really very reluctant to express an opinion on that.

Q. Okay. If it was possible to do it in 1968, again, with measuring it in units, the units would not have deteriorated because the body was frozen?

A. I think they would have remained rather stable.

Q. Pardon me?

A. I think they would have remained stable, excuse me.

Q. Would continued freezing of a body, a body continuing to be frozen for some period of time, would the finding of acid phosphatase necessarily indicate seminal fluid or could there be another explanation?

A. It depends to a degree upon the level that you are dealing with. The finding of acid phosphatase in the female genital tract in very low amounts is apparently present normally, but it has to be very low amounts of this.

Q. But when the test is just for positive or negative, then we don't know the amounts, isn't that correct?

A. That's true, sir, because we don't know the sensitivity of the test used for this.

Q. With regard to the observations of the brain of the body, would that have been the same until it had thawed?

A. Yes, it is my opinion that that would have remained.

Q. And the lungs?

A. And the lungs, yes, sir.

Q. ^ADo you have any opinion as to how long it takes a body to thaw, say, that body taken to a mortuary where the temperature was 40 degrees? How long would it take to thaw?

A. I think a good period of time at 40 degrees, but again to give a specific term in terms of hours, I can't do that. You see, it would depend upon the size of the body I think too as well.

Q. Would thawing and refreezing have any effect upon the body at least with regard to the observations that Dr. Luka was able to make?

A. It would depend upon the interval between the thawing, refreezing and thawing and how long it was thawed out, because if it was thawed out for a good period of time, then, of course, we would have enzymatic decomposition; but if it was just thawed out before the examination, I think the change would be not significant.

Q. Well, of course, the outer portions of the body would thaw out first, isn't that correct?

A. Yes, sir.

Q. I mean the face would thaw quicker than the internal organs, isn't that correct?

A. Yes, that's true.

Q. And could that possibly have caused this condition of the blackening or bluing of the face?

A. No, I think the bluing of the face was—is blood in the face, you know, that's what caused the blue color

is blood that does not have oxygen. Just like we have on the veins on the back of your hands. And I think that, as with the other physical findings, that kept and preserved it very closely and accurately reflecting the condition at the time of the freezing.

Q. Well, I am trying to think of the term. In any normal death, the blood stops flowing and in that—and that condition does itself—isn't that called livid?

A. Lividity, yes, sir, you are correct.

Q. How do you distinguish that condition from cyanosis?

A. How do I distinguish lividity from cyanosis?

Q. Yes.

A. Oh, they are both from blood settling into areas of the body.

Q. Well, if this body had died from other means than suffocation or strangulation, would the facial observation be the same?

A. Would you repeat that?

Q. Okay. If when a person dies, the blood stops flowing and there is this indication which indicates a blue color or a black color, just by death alone, wouldn't a person's face look blue or black?

A. It may be, but it is the dependent portions of where the face is since gravity influences the settling out of blood. It settled out into the most dependent parts of the body.

Q. Doctor, also, these slides that were taken by Dr. Luka at the time the body was found and then thawed, these aspirated solutions which indicated the presence of acid phosphatase, if they were indeed seminal fluid, could they be preserved and tested for blood type?

A. Yes. Blood typing can be done on the seminal fluid.

Q. Now, they could have been done at that time, isn't that correct?

A. Yes, sir.

Q. And if those slides were still preserved, could it be done today?

A. If we still had those slides, oh, I don't know. That would depend upon how they were preserved, where and the circumstances, because again this is tissue of a type too and, of course, it can deteriorate and dry out and lose its activity over a period of time, so that would depend upon the temperature where it was preserved.

Q. Is there no normal procedure for preserving slides at least at that time in 1968 that would—

A. For acid phosphatase?

Q. Well, for this substance that the doctor concluded was seminal fluid.

A. I think to be as accurate as I can be, if we had a slide that was stained and there were spermatazoa on that, those certainly would be kept in a stable situation indefinitely that we could relook at the slide again for the spermatazoa, because that's a visual observation on a microscopic slide. But to do a chemical test on a slide

is—because the enzymes that are there, I believe would probably be—would deteriorate, dependent upon where they were at.

Q. Okay. What Journals do you subscribe to in your profession, Doctor?

A. In my profession?

Q. Yes, with regard to forensic pathology.

A. Journal of Forensic Sciences; The Criminologist, although, that hasn't been published for, I think, a year or two.

Q. Well, with regard—

A. The American College of Pathology Laboratory Medicine; The American Society of Clinical Pathology; The Cancer Journal; The American Medical Associations Journal; New England Journal of Medicine; Hastings Review—

Q. Okay. I think that's enough.

A. Yes. Yes.

Q. Now, with regard to these Journals, have you read within the last year of a situation in Pittsburgh, Pennsylvania in a rape case where nine years later a pathologist looked at the slides of seminal fluid, made the test as to blood type and it excluded the defendant after a period of eight or nine years? Have you read anything about that case in your Journals?

A. I don't recall the case, sir.

Q. What does freezing do to the body with regard to determining time of death?

A. After it is frozen, there is really no way that you can determine the time of death just from looking at the body. You have to go into other situations in the—and the circumstances in order to determine that.

Mr. Wellman: I think we are through at this point, Your Honor. If we could just ask him to be back at 1:30, I'm sure it would be very brief.

The Court: Gentlemen, is that agreeable?

Mr. Blink: It is, Your Honor.

The Court: Doctor, you are excused. If you could be back at 1:30, they will conclude their cross-examination.

Dr. Rose: Thank you, sir.

The Court: Call your next witness.

Mr. Blink: My next witness was scheduled for after lunch, Your Honor. I anticipated longer cross-examination.

The Court: Oh, I see. Okay. Then we will be recessed until 1:30 sharp.

Gentlemen, could I see you in my office briefly?

(At this time the morning record was closed at 11:23 a.m.)

Afternoon Session

1:30 p.m.

The Court: Dr. Rose, you remain under oath, of course.

Dr. Rose: Yes.

The Court: Proceed, Counsel.

Cross-Examination

By Mr. Wellman:

Q. Dr. Rose, you previously told us that you had examined Dr. Luka's Medical Examiner's Report, is that correct?

A. Yes, sir.

Q. And, of course, you—scratch that. Is it not true that that report indicated that part of the body, the facial area, had been disturbed; Dr. Luka concluded by some sort of an animal, is that correct?

A. Yes, sir.

Q. Okay. Now, in your experience with—your professional experience as a forensic pathologist, is that not an uncommon occurrence when a body is left in a rural area?

A. Yes, sir. It is not uncommon, sir.

Q. And do you have any opinion as to the rate that a body might be disturbed in that manner if left in a rural setting where the body was frozen?

A. Well, I am not quite sure what you mean. Until the body was completely eaten away or until superficial injuries were there or—

Q. Well, I am asking you with regard to the facial area, it is a possibility that the observation of cyanosis of that facial area would not have been possible had the body deteriorated by rodents or animals knowing away that area of the body, isn't that correct?

A. If the face had been eaten away, yes, then we could not determine the cyanosis, yes, sir.

Q. What I am asking you, is there any way to determine or to give an opinion as to what period of time that would likely happen in that rural setting?

A. No, not in my experience. I don't know how long it would have taken. It would have depended upon the animals that would have eaten at the body. I have no way of knowing how prevalent they were in that area.

Q. Now, with regard—you talked about enzymes and they would not deteriorate in a frozen condition and I asked you specifically with regard to acid phosphatase. Now, is that an enzyme?

A. Yes, sir, it is.

Q. Now, would the temperature, if it were more specific than just frozen, if we talked in degrees of 32 down to zero, with temperature ranges within that range of zero to 32 degrees, have any difference as to how that enzyme might deteriorate?

A. It is my opinion that it probably would not make any difference between zero and 32 degrees; 32 degrees being the freezing point, of course.

Q. So if it were 31 degrees, in your opinion it wouldn't make any difference if it were 31 or 10 below zero?

A. I think it would be the same for all practical purposes, yes, sir.

Q. Can I ask you at what rate a body might thaw out after being removed from a frozen area and, as I recall, you weren't really able to give us time in terms of hours?

A. No, I could not. That would depend again I think on the environment temperature in which the body was in—in which it was thawing.

Q. Well, do you have any way to give us an opinion as to what period of time the temperature would have to be over 32 degrees for the enzyme and acid phosphatase to deteriorate?

A. Well, I think that if it were up to a—we are up to 50 degrees Fahrenheit, then we are getting enzymatic activity and the deterioration takes place. Now, whether that would be 24 hours or whether it would be 48 hours, I couldn't say.

Q. You have told us that the positive-negative acid phosphatase would not necessarily indicate seminal fluid, isn't that correct?

A. Yes, sir, that is correct.

Q. And that would apply to the mouth, the oral cavity, as well as the vaginal area?

A. I have no experience in the oral cavity in that, sir. I speak only to the vaginal vault.

Mr. Wellman: I have no further questions.

Mr. Blink: No further questions, Your Honor.

Examination

By the Court:

Q. Doctor, did I understand you to be saying earlier this morning that there is some natural phosphatase, I guess you have been using, which I assume you are meaning male sperm or an indication of male sperm?

A. No, I am speaking of the—well, if we would look on the ejaculate as being—well, separate it into two components; one the sperms and one the acid phosphatase, the sperm may or may not be present because there are areas where—well, after a vasectomy, there better not be spermatazoa there or there's a problem because that sometimes is used as a birth control method. But the acid phosphatase, if it is there in the seminal fluid, that would be the other component, sperm one, acid phosphatase the other in the ejaculate. Yet, we realize in fine testing in small quantification that in the vaginal tract, there is some material in very low quantities that does give a positive for acid phosphatase.

Now, this does not mean that it is a sensitivity of the test and customarily, what we did was to—your sensitivity of the test was such—is because in using numbers, if we use King Bodansky's units to measure this, these are arbitrary units. We would have—well, 25 is maybe a cutoff point so you may find up to 25 units in the female vaginal area normally without intercourse. But in the male ejaculate, there may be four to five thousand units, so that you see a positive test. And for years, our sensitivity of the test was such that these trivial or small numbers of units did not give a positive. It had to be up in the very high quantities to give a positive.

Q. Did I understand you to say or did I infer correctly that in reading the Medical Examiner's Report you found a positive finding for acid phosphatase?

A. In the mouth, anus and vagina, yes, sir.

Q. And the report simply stated positive, rather than quantities that you and counsel were talking about?

A. Yes, sir, that's correct.

Q. And in making such a report, would a Medical Examiner normally report what you speak of as the natural amount in all the vaginal tracts as a positive?

A. No, sir. Customarily, and in my experience in doing this, our test was not that sensitive to pick up those small amounts. We picked up big, large amounts on this.

Q. And in reading the Medical Examiner's Report, from your experience in seeing similar reports, would you understand that he was referring then to the natural amount that you speak of as being present in all vaginal tracts?

A. I assume that he is referring to the usual quantitative test, which would only be positive when they were rather large amounts. Now, I only assume that, I do not know.

Q. Yes. I am saying based on your experience.

A. Yes, sir, based on my experience.

The Court: Gentlemen, anything further?

Mr. Owens: Yes.

Re-Cross Examination

By Mr. Owens:

Q. Doctor, are you talking about your experience based upon the knowledge of acid phosphatase in 1968 or upon that knowledge today?

A. Well, I think rather both because I am talking about the positive and negative as the way we did it really through the 60s, but today, we are talking about quantitating it into individual units.

Q. But they didn't do that back in 1968?

A. I think that was done on occasion, but generally speaking the test was positive or negative, yes, sir.

Q. On its face then, of the report, on the face of Dr. Luka's report, you can't tell whether he is talking about just the usual amounts or of a.p. there or higher quantity; just on its face?

A. Just on its face?

Q. Right.

A. No, I cannot.

Q. In fact, Doctor, had you been doing that, what would you have done?

A. I probably would have done just a positive or negative test too, but knowing the basis and background of the test and the laboratories with which I was associated, I would have then known that this had to be not the trivial traces, but a rather large amount.

Mr. Owens: I have nothing further.

The Court: Gentlemen, anything further of this witness?

Mr. Blink: No, Your Honor.

The Court: Thank you, Doctor.

The Witness: Thank you, sir.

(The witness was excused.)

The Court: Mr. County Attorney, did I understand you to tell me informally, along with other counsel, that this would be all of your evidence that you were offering on the—if they would have found the body anyway point?

Mr. Blink: That's correct, Your Honor.

The Court: Do you gentlemen—you can proceed any way you want to. If you have any evidence on this particular point, you could present it now or you can wait until the end of all the State's evidence.

Mr. Owens: Your Honor, we only have two items. We might as well get the issue done now.

The Court: Fine. Okay.

Mr. Owens: We have, Your Honor, a sunrise and sunset central standard time for Des Moines, Iowa. The time the sun came up and set in the evening for December 26, which would be stipulated to as accurate and correct by the State.

Mr. Blink: If that is correct, it may be so stipulated.

Mr. Owens: On that date, Your Honor, the sun set at 4:50 p.m. and I would like to have that marked.

(At this time Defendant's Exhibit 1 was marked for identification by the court reporter.)

Mr. Owens: Also, Your Honor, I would like to enter the testimony—previous trial testimony of Officer Captain Leaming of 1968 where he talks about and gives testimony relating to the weather conditions at the time; the fact that Officer Wissler was searching for the body where Mr. Williams indicated it would be and it took them five minutes to find it when he pointed it out. That's Pages 224, 241 and 242 of the original trial transcript of 1969.

(At this time Defendant's Exhibit 2 was marked for identification by the court reporter.)

Mr. Owens: Those are Exhibits—Defendant's Exhibits No. 1 and 2, Your Honor. One being the sunset-sunrise chart; 2 being the previous trial testimony of Officer Leaming. That's all we have as to this matter, Your Honor.

Mr. Blink: We do not have an objection to those exhibits.

The Court: I'm sorry?

Mr. Blink: No objection to the exhibits.

The Court: They will be received.

Mr. Owens: That's all we have at this time on this issue.

The Court: Very good. Proceed, Mr. County Attorney.

Mr. Blink: Your Honor, the State would call Ed Breese to the stand.

(At this time State's Exhibit M was marked for identification.)

RULING ON MOTIONS TO SUPPRESS
EVIDENCE
POLK COUNTY DISTRICT COURT
(6/1/77)

The defendant's several motions to suppress, filed 5-6-77 and 5-16-77 went to hearing on 5-31-77. Robert Blink for the State—Roger Owens, John Wellman and Gerald Crawford for the defendant.

The motion of 5-6 seeks to exclude all evidence of conversations with or actions of the defendant on the auto trip from Davenport to Des Moines on 12-26-68. The conversations referred to in Paragraph 2 of such motion, according to counsel, was one of the above conversations. More importantly, the defendant seeks in Paragraphs 3 and 4 to exclude all evidence got at through such conversations and actions of the defendant—that is he seeks to exclude from evidence the corpus delecti itself—evidence of the finding of the body of Pamela Powers and the fact of her death. If defendant's motion is good, the State cannot prove her death in a court of law.

This was precisely the ruling of the U. S. Supreme Court in this case, *Williams v. Brewer* on 3-23-77 (97 S. Ct. 1232) that “neither Williams’ incriminating statements themselves nor any testimony describing his having lead police to the victims body” (that occurred after what the Court terms the “Christian Burial Speech”) can constitutionally be admitted into evidence”. It followed from this ruling that without such conversations and actions of the defendant no evidence could be admitted that the body was even found—that she was in fact deceased.

Yet in that same footnote to the lead and plurality opinion by Justice Stewart the U. S. Supreme Court goes

on to state, "Evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams." Citing *Killough v. U.S.*, 336 F. 2d 929. In the event a retrial is instituted it will be for the State courts in the first instance to determine whether particular items of evidence may be admitted." This Court concludes such theory was likewise the foundation for the statement of concurring Justice Marshall that he doubted the defendant would go free "given the ingenuity of Iowa prosecutors on retrial".

It is on this narrow strand that the State now seeks to admit into evidence that Pamela Powers was indeed deceased.

The burden of proof is on the State to prove by a preponderance of the evidence that the body would have been discovered "in any event".

The information known to the police, excluding the evidence banned by the U.S. Supreme Court, began on 12-24-68 when they were called at or shortly after the disappearance of the 10-year-old girl from the Des Moines Y.M.C.A., the identification of the defendant by three persons as one who [unreadable] covered bundle from the building to his car shortly after the disappearance and placed it in the seat with two legs protruding (seen by one of the three witnesses), and his leaving hurriedly, resisting efforts to stop or talk to him. The car description and its license number were taken. It was known that the defendant was a resident at the Y.M.C.A.

From the news clippings submitted for this period of time by the defendant in connection with his motion for change of venue it can be seen that the abduction of the girl was attended by a great deal of publicity and public reaction. Public help was sought by the police to find her. Before 8:00 a.m. on Thursday 12-26-68 the police knew that clothing thought to belong to the missing girl was found at a highway reststop near Grinnell, Iowa because B.C.I. Agent Ruxlow went to Grinnell at that time to organize an area search for her. The police also knew the defendant's car had been found in Davenport in the a.m. of Wednesday 12-25-68. Radio appeals for volunteers were put out at Grinnell and about 200 people volunteered. They were organized into teams and assigned to areas or grids on detailed maps in a band two to seven miles wide north and south of Interstate Highway 80 in Poweshiek and Jasper Counties and the search started westward at 10:00 a.m. on Thursday 12-26 and was intended to proceed into Polk County likewise. They were instructed to search roads, ditches, culverts, abandoned buildings, etc. They used cars, snowmobiles and were on foot. Agent Ruxlow impressed the Court as an intelligent and organized man with experience in the area of searches. The method used was based on experience. Agent Ruxlow is now Assistant Director of the Iowa B.C.I.

It is clear that the police concluded, with reason, that the abducted girl was taken eastward on I-80 since the very car she was taken in was found in Davenport the next a.m. and that some of her clothing was found near Grinnell at a highway reststop. They thus surmised that she perhaps had been left between Des Moines and that rest-

stop near Grinnell and hence the search westward from Poweshiek County in a band on either side of I-80 into Polk County. The Court concludes also that under these circumstances the public would have been aroused—as evidenced by the large number of volunteers on a Thursday, a workday, and the feeling would be intense. It was then not known that the girl was dead.

Agent Ruxlow was informed that the defendant was thought to be leading the officers to the body and he left the search headquarters at Grinnell to join them at about 3:00 p.m. on 12-26-68. At that time the search teams had gotten about to the Polk County Line. The body in fact was only two to two and a half miles away. Sunset was then less than two hours away with darkness to follow and there was snow, but it was light snow. An inch had been accumulated on the ground nearly a week and one inch was added on the 26th. See Ex. F. By the photos Exs. C and D the body was not snow-covered.

The Court concludes that the searchers would have arrived at the site of the body within a short time of its actual finding, had they continued the search after dark. The culvert in question was itself uncovered and readily visible and in getting down to look into it as the searchers were doing the depression on either side of it would have been obvious—the body was in one of these depressions. Had the searchers stopped due to the snow and the dark the next day was a Friday and a weekend was upcoming—the search would clearly have been taken up again where it left off, given the extreme circumstances of this case and the body would been found in short order.

Regarding the five minute difficulty in finding the body by the officers as it bears on the likelihood of its being found by the searchers—defendant relies on Ex. 2, Officer Leaming's testimony. It appears the defendant was at first sure but subsequently not so sure of the location. It appears the officers would have been trying to follow the defendant's directions as to where the body was located and when the body did not show they apparently concluded that it was nearby instead. The Court concludes that their method of search would have differed from that of the volunteer searchers in this regard. It appears that they may have been looking from the road surface instead of getting down into the ditch to look into the culverts, etc., as were the searchers, from which vantage point the body was visible.

The defendant also relies on what the U. S. Supreme Court calls the "Christian Burial Speech" for a description and prediction of the weather conditions. This Court is found by the U. S. Supreme Court's findings that this speech was a sly and cleaver [sic] psychological ploy, designed for mental coercion of the defendant—thus it cannot be converted here as an accurate statement of meteorological fact and weather prediction. In any case that "speech" was made back nearer to Davenport.

In any case the frozen body would have stayed frozen and deterioration suspended, into April according to Dr. Rose.

In any case according to the U. S. Supreme Court Decision, had the defendant not lead officers to the body as he did, he promised he would tell the whole story on ar-

rival at Des Moines (See page 3 of Justice Stewart's opinion) and defendant's attorney McKnight had told the defendant by phone in the presence of officers, before the auto trip, that he (defendant) was going to have to tell the officers where she (the victim) is when he arrived in Des Moines. (See page 2 of Justice White's dissent).

Accordingly, the Court concludes that the body of Pamela Powers would have been found in any event even had the incriminating statements not been elicited from the defendant and that decomposition would not have taken place so as to alter the medical examination findings of Dr. Luka and thus there held admissible in evidence.

The Court has studied the following additional cases and secondary authorities in arriving at a conclusion of law.

Weeks v. U. S., 232 U. S. 383 (1914).

Silverthorne Lumbar Co. v. U. S., 251 U. S. 385 (1920).

Nardone v. U. S., 308 U. S. 338 (1939).

Mapp v. Ohio, 367 U. S. 643 (1961).

People v. Ditson, 369 Pac. 2d 714 (Cal. 1962).

Wong Sun v. U. S., 371 U. S. 471 (1963).

Wayne v. U. S., 318 F. 2d 205 (D. C. CIR. 1963).

Killough v. U. S., 336 F. 2d 929 (D. C. CIR. 1964).

Harrison v. U. S., 88 S. Ct. 2008 (1968).

Keister v. Cox, 307 F. Supp. 1173 (1969).

Commonwealth v. Leaming, 247 A. 2d 590 (Penn. 1969).

U. S. v. Falley, 489 F. 2d 33 (2d Cir. 1973).

U. S. v. De Marce, 513 F. 2d 755 (8th Cir. 1975).

U. S. v. Kelly, 414 F. Supp. 1131 (1976).

Fruit of the Poisonous Tree—a Plea for relevant criteria, 115 U. of Penn. L. Rev. 1136 (1967).

Inevitable Discovery: The hypothetical independent source exception to the exclusionary rule, 5 Hofstra L. Rev. 137 (1976).

Maguire, How to unpoison the Fruit—the 4th amendment and the exclusionary rule, 55 C. Rim. Law, Criminology and Police Science 307 (1964 43 ALR 3d 385).

The Inevitable Discovery Exception to the Constitutional exclusionary rule, 74 Columbia L. Rev. 88 (1974).

Pitler, the Fruit of the Poisonous Tree, 56 Cal. L. Rev. 579 (1968).

Roberts v. Ternullo, 18 CR. L. Reporter, 2415 (1976).

A correlary to this situation are the cases dealing with the admission of identification testimony headed by *Simmons v. U. S.*, 390 U.S. 377. This case was interpreted and applied by *State v. Ash*, Iowa, 244 N. W. 2d 812. These cases also involve the 6th amendment's right to counsel and the test there is whether the questioned identification procedure was so "impermissibly suggestive so as to give rise to a very substantial likelihood of irreparable misidentification." The *Ash* case speaks of "independent origin" of the in-court identification which seems to be instructive as to the standard to be used in determining whether the finding of the body in this case, other than by the defendant's leading to it, can be said to be suffi-

ciently independent of the defendant's actions which are now stricken from the evidence.

The Wayne and Killough cases above seem to apply a "but for" test—can the State show by evidence that this is not a situation where the body would not have been found "but for" the actions of the defendant. In Harrison above cited the "but for rule" seems to be accepted by the U.S. Supreme Court; however, in *Brown v. Illinois*, 422 U.S. 590 the U.S. Supreme Court seems to reject the "but for rule" by saying that there was no automatic yes or no answer—rather asserting that the admissibility depends upon the totality of the circumstances.

Whether one considers the totality of the circumstances or the "but for rule" this Court concludes that the body would have been found by sources independent of the defendant before decomposition had taken place. In any event, the U.S. Supreme Court in this very case, *Williams v. Brewer*, relies on the Killough case, which in turn relies on the Wayne case. The fact situation here is stronger than either of those cases in this Court's opinion.

Accordingly, Paragraph 1 of such motion is sustained as to statements or actions of the defendant after the so-called "Christian Burial Speech" and throughout the remainder of the automobile trip from Davenport to Des Moines; Paragraph 2 is sustained. Paragraph 3 is sustained except the words "the reason for" in line 1 in that the Court does not understand their application here. Paragraph 4A is sustained as to photographs such as those in evidence at the hearing taken on 12-26-68 and Paragraphs 4 B, C and D are denied.

As to the defendant's motion to suppress filed 5-16, Division I:

The defendant seeks to suppress the search of the defendant's room at the Y.M.C.A. and the seizure of items therefrom under the search warrant Ex. M, dated 12-25-68. The burden of proof is on the defendant who attacks the warrant.

The warrant information on its face shows ample probable cause. However, the defendant is entitled to attack verity of facts recited explicitly or implicitly in the warrant, being the date of the search and seizure. See *State v. Boyd*, 224 N. W. 2d 609.

The defendant proved, contrary to the testimony of State's witnesses, that a search was conducted on 12-24-68, not 12-25 as recited in the warrant. See Exs. 3, 4, 5 and 6, which show clearly that officers were acting in relation to things seized from the defendant's room on 12-24-68. The Court cannot accept that all such documents were all misdated the 24th instead of the 25th. Although on 12-24-68 exigent circumstances were compelling such as to justify a warrantless entry in that there was immediate need to gain any clue as to the destination of the known abductor and thus the victim, yet there is no evidence whatsoever at all that such was the motive for the entry to the defendant's room without a warrant on 12-24-68. Granted that the State's witnesses' memory as to their actions and motives is being revived after 8 and a half years, yet this Court cannot act on such assumptions—it is bound by the evidence. The fact that probable cause was present all along and would have been likewise adequate on 12-24-68 cannot be held to validate the re-entry with a search war-

rant after the prior warrantless entry and search was conducted.

Accordingly, the defendant's motion to suppress, Division I, is sustained.

As to the defendant's motion to suppress of 5-16-77 Division II:

The defendant seeks to suppress the body hair samples obtained from the defendant on or about 12-26-68 in the Des Moines City Jail. The simple answer to this motion is that the defendant was asked directly and simply, in the manner and to the extent testified to by the officers, to give the hair samples and he consented. There was no compulsion involved in any form—the Court finds the defendant knowingly waived any constitutional right he may have had to refuse such samples.

Accordingly, such motion, Division II, is denied.

As to the defendant's motion to suppress of 5-16-77,

Division III:

The defendant has the burden of proof in this motion to suppress evidence seized from the defendant's car in Davenport, Iowa by search warrant, Ex. O, of 12-26-68. The information for the search warrant has insufficient information to show probable cause and would thus be subject to attack under *State v. Liesche*, 228 N. W. 2d 44, if it were a contemporary warrant. However, the warrant is 8 and a half years old and is to be tested by the law ante-dating the statutory amendment applied in *Liesche*. There would be no way for the police and Magistrate to be aware of the statutory amendment which was

not law until later, 7-1-69, and they could only utilize the existing law which authorized issuance of warrants on the basis of sworn but unrecorded or unsummarized information. See *State v. Spier*, 173 N. W. 2d 854, *State v. Lampson*, 260 Iowa 806. The information given the Magistrate by Officer Yeager constituted ample probable cause for the warrant. The seizure alone without search of the auto for security purposes prior to the search warrant does not constitute a warrantless search or otherwise invalidate the warrant. The search was conducted under the warrant after the defendant was in custody.

See generally *State v. Anderson*, 148 N. W. 2d 414 and *State v. Vallier*, 159 N. W. 2d 406.

Accordingly, the motion aforesaid, Division III, is denied.

/s/ J. P. Denato, JUDGE

CLERK: Mail to

Roger Owens, Offender Advocate
Gerald Crawford, 1021 Fleming Bldg.
County Attorney Rob Blink

DEFENDANT'S EXHIBIT 2, SUPPRESSION
HEARING: TESTIMONY FROM 1969 SUP-
PRESSION HEARING

[Printer's Note: Pages 224, 241-42 of Original Transcript]

A. Well, Mr. Williams was very talkative, and he was asking me who we had talked to that were friends of his, if we talked to the reverend from the church, if we talked to Mr. John Searcy, if we had checked for fingerprints in his room at the YMCA, and we discussed religion. We discussed intelligence of other people. We discussed police procedures, organizing youth groups, singing, playing a piano, playing an organ, and this sort of thing.

Eventually, as we were traveling along there, I said to Mr. Williams that, "I want to give you something to think about while we're traveling down the road." I said, "Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched also.

Q. (By Mr. Hanrahan) Were the cars parked side by side?

A. Yes, sir.

Q. Have your windows down and talking through the windows?

A. Yes, sir.

Q. Okay.

A. Wissler proceeded that way and we went on back the other way and came around, and the BCI cars also came around back there and south and then back.

Q. The way you did?

A. Yes, sir.

Q. Did you see Wissler's car when you got down here?

A. Yes, sir.

Q. Where was he?

A. Well, he was a mile and a half west of that intersection, had his car parked on the north side, which would be the wrong side of the road. He was heading east, and had his spotlight shining down into the ditch, had his window rolled down.

Q. Did Mr. Williams say anything at that point?

A. Yes, sir, he did.

Q. What did he say?

A. He said, "He's found her. That's exactly where she is, right there, right where he's at."

Q. Now this spot is one and a half miles west from this intersection?

A. Yes, sir.

Q. And these roads are two miles apart, I believe you said?

A. Yes, sir.

Q. So that would be about three-quarters of the way down there?

A. Right.

Q. Then where did you go, Captain?

A. Well, I talked to Wissler, he pulled away from there.

Q. Wissler left that spot?

A. Yes, sir, pulled up side by side to us, heading east, us heading west. And I asked him if he saw anything there. He said no. And I said, "Well, that's where Mr. Williams says that she is." So we pulled right over by that spot and stopped and Wissler and the BCI cars came up there and they got out and started searching on foot. They searched for approximately five minutes and Mr. Williams said he thought if he went on up to the intersection and turned around and came back he able to pinpoint it a little closer, that he felt they should have found her by now. And this we started to do, but just as we started to proceed, why the officers hollered and shined their flashlight and stated that they had found her.

Q. Did you get out of your car at that time?

HABEAS HEARING

[Printer's Note: Pages 8-14; 20-21 of Original Transcript]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

No. 80-450-D

ROBERT ANTHONY WILLIAMS.

Plaintiff,

vs.

DAVID SCURR, WARDEN; and THE ATTORNEY
GENERAL OF THE STATE OF IOWA,

Defendants.

2nd Floor Courtroom
U. S. Courthouse
East 1st and Walnut Streets
Des Moines, Iowa
Monday, August 3, 1981

The above-entitled matter came on for hearing at
10:00 a.m.

BEFORE:

THE HONORABLE HAROLD D. VIETOR, Judge
APPEARANCES:

ROBERT BARTELS, Attorney at Law, and SARAH
MEGAN, Student Legal Intern, Prisoners Assistance Clin-
ic, College of Law, University of Iowa, Iowa City, Iowa
52242, appearing on behalf of the Plaintiff.

THOMAS D. McGRANE, Assistant Attorney Gen-
eral, 2nd Floor Hoover Building, Des Moines, Iowa 50319,
appearing on behalf of the Defendants.

• • •

GERALD CRAWFORD,

called as a witness by the Plaintiff, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Ms. Megan:

Q. What is your name?

A. Gerald Crawford.

Q. What is your occupation?

A. I'm an attorney licensed to practice law in the State of Iowa.

Q. Were you appointed to represent Mr. Williams in the 1977 new trial?

A. Yes.

Q. In preparation for the trial, did you examine any photographs of the scene where Pamela Powers' body was found?

A. Yes.

Q. Where did you see these photographs, Mr. Crawford?

A. I believe that we viewed them in the County Attorney's Office. The County Attorney's Office at that time had several different locations. It would have either been in the Polk County Courthouse on the 4th Floor, which was the main office, or what they call their Major Offense Bureau, which is in the Des Moines Savings & Loan Building, I believe on the 11th Floor.

Q. What did you see when you went to the County Attorney's Office to see these photographs?

A. The photographs were contained either in several large envelopes or a box, I'm not certain which, and we looked through the photographs at that time; maybe on more than one occasion.

Q. How was it that you were permitted to see this box with these envelopes?

A. They were made available to us by the County Attorney. We had requested an opportunity to view all of the police reports that had been made at the time this whole thing occurred back in 1968, and Judge Denato had ordered that we be allowed to have an opportunity to review the police reports, and we were allowed to see the photographs, as well.

Q. Did you believe the envelopes or the box to contain all of the physical evidence that was available to the prosecution at that time?

A. I had no reason to believe otherwise.

Q. What was contained in these files?

A. Well, there were a number of photographs, as I indicated. Are you referring to all of the evidence, or just the photographs?

Q. What was, in total, contained in the file?

A. We had an opportunity to look at the police reports, as I indicated, photographs, certain physical items of evidence, clothing, things of that nature.

Q. How many photographs were contained in the file?

A. Many; dozens.

Q. Did you look at all of the photographs?

A. Yes.

Q. What did—

A. On more than one occasion.

Q. What did the photographs depict?

A. The photographs showed the scene where the body was found, the road area leading to the scene. I think there were photographs depicting a vehicle that belonged to Mr. Williams. There were photographs from the YMCA.

I believe there were additional photographs that had been taken of the body of Pamela Powers once she had been returned to Des Moines to the Medical Examiner's Office.

Q. Mr. Crawford, when did you see these photographs? When did you view the file?

A. Well, early on in the pretrial proceedings, there were a number of issues that needed to be explored as we worked our way toward the pretrial in this matter; and a base that we used to determine dividing up areas of responsibility was the availability of this material.

In other words, once we were able to go through the material, we were able to start to know what we needed to do to prepare for trial, so it was very early on in the pretrial proceedings.

Q. So it was prior to the Motion to Suppress Hearing?

A. Yes.

Q. Did you know at that time when you viewed the file that inevitable discovery would be an issue at the Motion to Suppress Hearing?

A. Yes.

Ms. Megan: Your Honor, may I have permission to approach the witness?

The Court: Yes.

Q. (By Ms. Megan) I'm handing you, Mr. Crawford, Exhibit 1. Mr. Crawford, had you seen that photograph prior to the Motion to Suppress Hearing?

A. No.

Q. Are you absolutely certain that you didn't see this photograph?

A. Absolutely.

Q. I'm handing you, Mr. Crawford, Exhibit No. 2. Had you seen Exhibit No. 2 prior to the Motion to Suppress Hearing?

A. No.

Q. Are you certain that you did not see Exhibit No. 2?

A. Yes.

Ms. Megan: Your Honor, I would like you to take these exhibits at this point, as it will be helpful for the argument.

Q. (By Ms. Megan) Just for the purposes of the record, Mr. Crawford, I would like to ask you a few ques-

tions about Mr. Wellman. Was Mr. Wellman also appointed to represent Mr. Williams in the 1977 new trial?

A. John Wellman from here in Des Moines, yes.

Q. Was Mr. Wellman blind at that time?

A. Yes. He's been blind since a hunting accident when he was in high school.

Ms. Megan: I don't have any further questions.

The Court: Any cross-examination?

Cross-Examination

By Mr. McGrane:

Q. Do you know what the date of the Motion to Suppress was?

A. No.

Q. How soon before the Motion to Suppress did you look at this police file?

A. I'm not certain.

Q. An approximation?

A. At least days before, and probably a week or two before.

Q. Do you know how many pictures there were of the scene with the body in it that you looked at?

A. You're talking about where the body was located?

Q. Yes; that included the body itself.

A. I don't remember with any clarity how many photographs there might have been. I remember that there were photographs at the scene depicting the body.

Mr. McGrane: That's all I have, Your Honor.

The Court: Do you have any redirect?

Ms. Megan: No, Your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Do you have further evidence to offer?

Mr. Bartels: No, Your Honor.

The Court: Does the State have evidence to offer?

Mr. McGrane: No, Your Honor. The trial record, of course, is a part of the record in this case.

The Court: It's before the Court. Thank you.

Mr. Bartels.

Mr. Bartels: Your Honor, I have one more stipulation which I wanted to wait to enter until Mr. Crawford had testified.

Mr. McGrane and I would stipulate that if Roger Owens, who was Mr. Williams' third defense lawyer at the 1977 trial, were called to testify, he would testify that he also looked at the prosecutor's file, including the photographs and that he did not see in those photographs Exhibits 1 and 2 that have been introduced.

Mr. McGrane: I would rather stipulate that he does not recall seeing them. I don't know which I agree to.

Mr. Bartels: I think we agreed to what I just said.

Mr. McGrane: I won't back down. It's not a major point. I will agree he would testify he did not see them.

The Court: All right.

• • •

The Court: I would like an answer to my question. Go ahead and continue, but I would like to have clarified exactly how this Federal Habeas Corpus Court can now evaluate this claim on the basis of apparently, as I understand it, newly discovered evidence; that it hasn't yet been explained to me when the Plaintiff first learned of these photographs, or how, or anything like that.

Ms. Megan: Your Honor, the Plaintiff, Petitioner, first learned of these photographs since the beginning of this proceeding. The photographs were not available, as Mr. Crawford testified, at the time of the Motion to Suppress Hearing, or at the time of the first trial; apparently through no fault of the Defense Counsel.

The Court: How did they surface? Is there anything in the record about that?

Mr. Bartels: Your Honor—

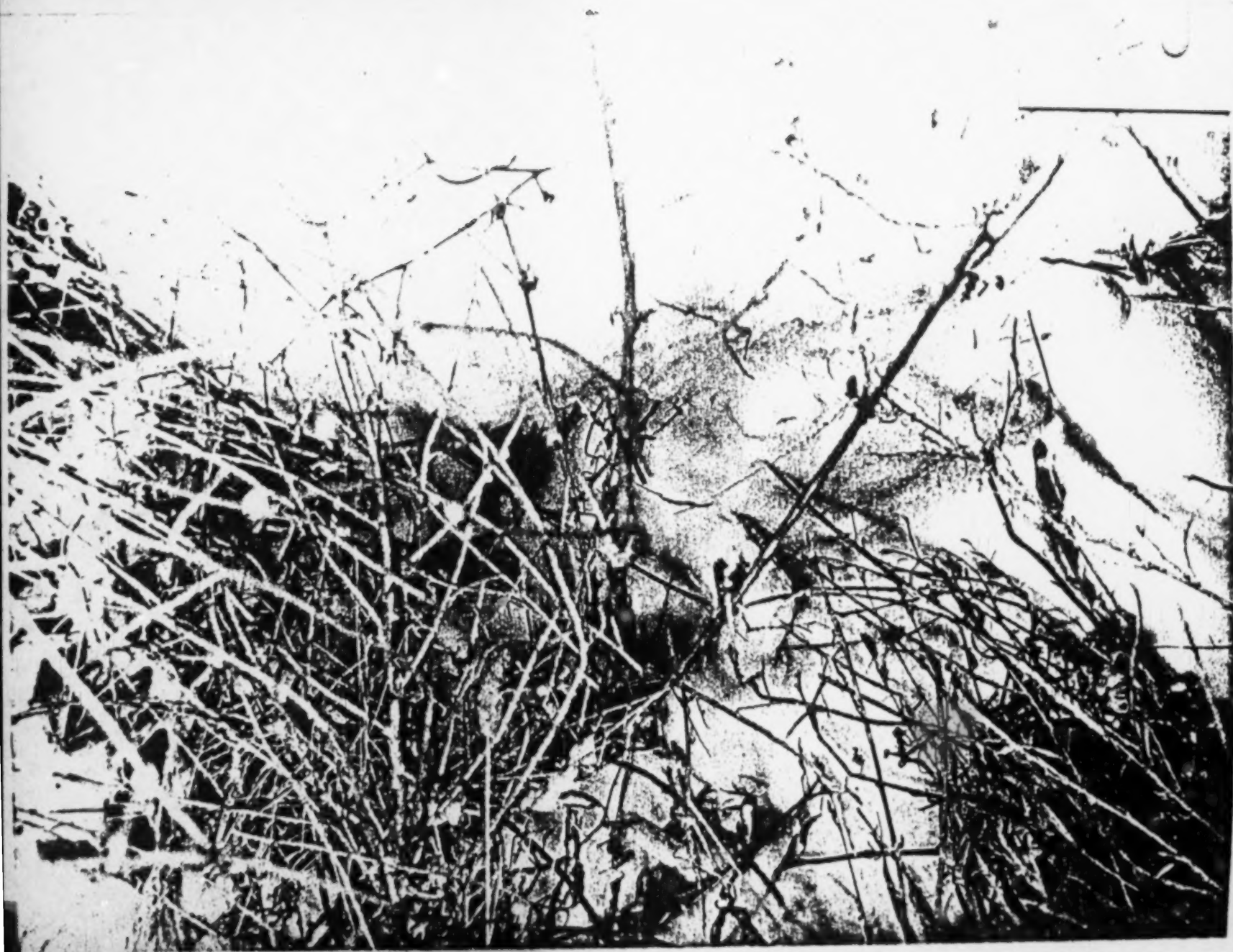
The Court: All I know is suddenly we have photographs we didn't have before, and I'm not being told what the story is. How did these photographs surface?

Mr. Bartels: If I can make a statement for the record, Your Honor, I'm really not quite sure exactly when this occurred, but it was early this year. In preparing one of the memoranda, we began to look at the pictures that we had, realized from the testimony of one or two of the police officers at the Suppression, that we didn't have all of the pictures, that there were some other pictures taken at the scene; and, really, just out of an access of—what seemed like an excess of caution at the time, we thought we ought to at least see what they looked like, and I asked

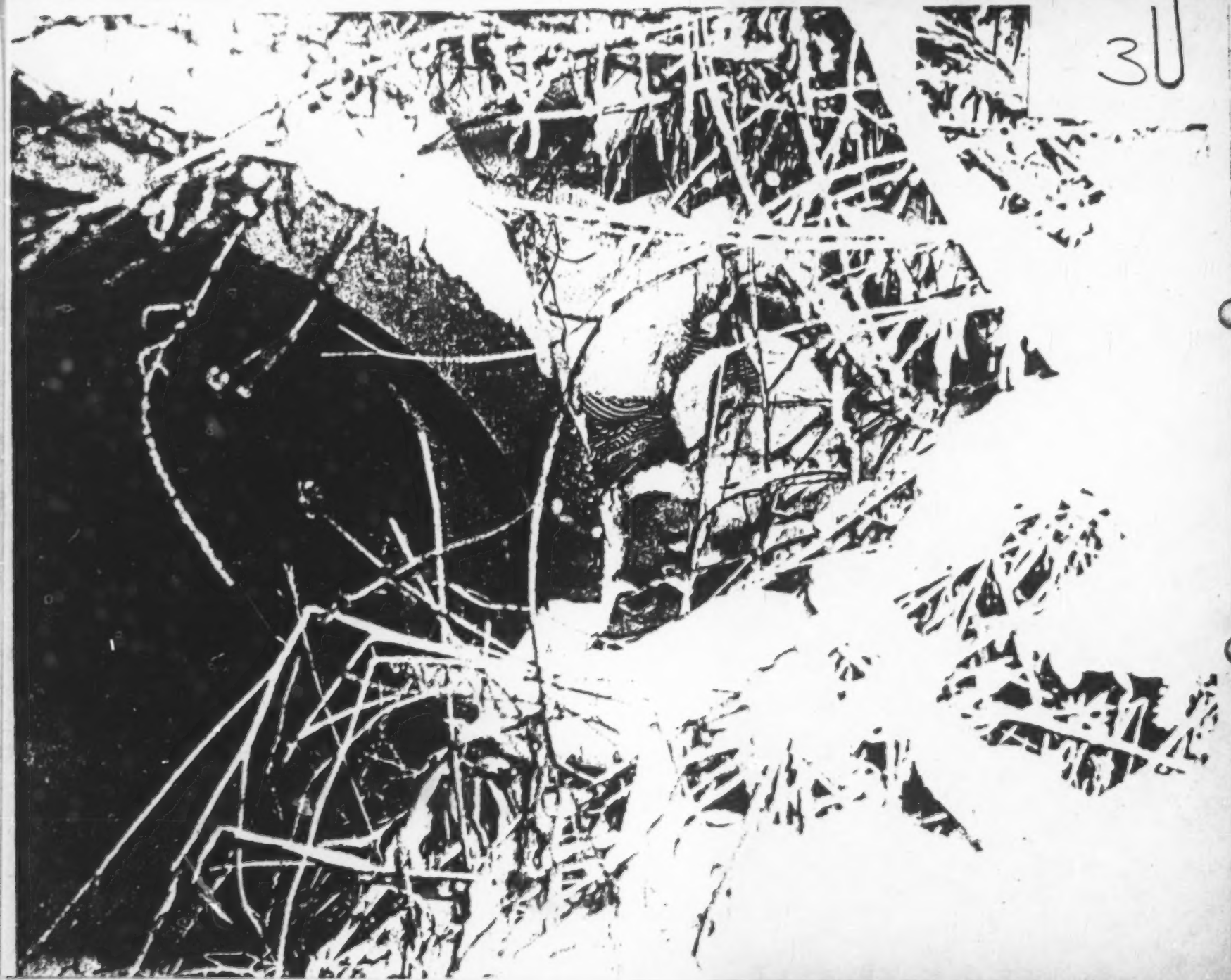
an intern named Chris Jackson to go to Des Moines in an attempt to locate the rest of those pictures.

He went to the Courthouse in Polk County, went down in the tombs, and looked in a box of evidence that included the kinds of items Mr. Crawford was talking about; clothing, car set, a lot of slides, and so forth; and included was a package of photographs.

To say that they were organized in any way would be overstating it; but included in those photographs were Exhibits 1 and 2 that have been introduced here.



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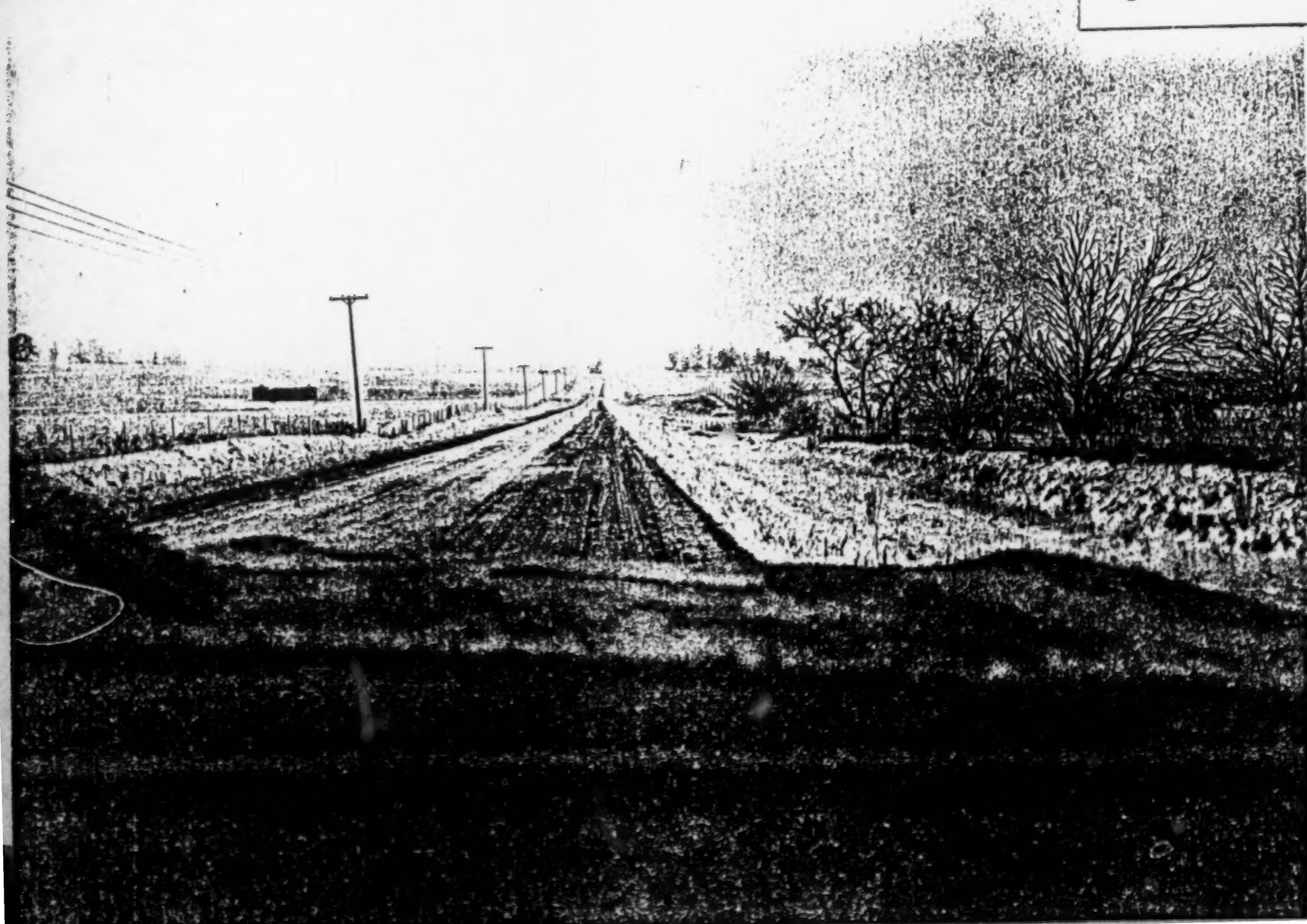


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N.C.

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H.C.
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BUREAU OF CRIMINAL INVESTIGATION
Department of Public Safety
HABEAS CORPUS EXHIBIT 11

(PRINTER'S NOTE: The original copy, from which this is taken, has been trimmed, both right and left sides, so there are words missing. We indicate missing words with use of a dash (—).)

Investigated: December 26, 1968; Date: January 6, 1969; Typed: 3-3-69; Typed by cm; File Number, 681353; —Case: Homicide—Pamela Powers—White Female—Age ten years—December 24, 1968, Des Moines, Iowa; Petitioner's Deposition Exhibit No. 1, LP 7-16-81; Nature of Case, Homicide, Class No. 7; Reference: Original Report by Dan Mayer, Special Agent; Report made by: Thomas R. Ruxlow, Special Agent; Approved by [initials].

SUPPLEMENTAL REPORT

On December 25, 1968 the reporting agent received a call from State Radio advising this reporting agent to meet with Special Agent Mayer at the Grinnell Police Department on December 26, 1968 to assist him in the investigation of the above captioned case.

On December 26, 1968 at approximately 8:00 A.M. this reporting agent met with Special Agent Mayer at the Grinnell Police Department and was instructed by Special Agent Mayer to organize a search covering Poweshiek and Jasper counties approximately seven miles north of the Interstate 80 and seven miles south of Inter-

state 80 searching for the victim PAMELA POWERS. This reporting agent with the assistance of approximately two hundred volunteers conducted a search covering seven miles either side of the interstate through Jasper and Poweshiek Counties.

At approximately 3:00 P.M. December 26, 1968 this reporting agent and Special Agent Mayer and Special Agent John Jutte followed Des Moines detectives who had the suspect in their car from the Grinnell interchange to the Mitchellville interchange on interstate 80 where a search was conducted for the body of the deceased, PAMELA POWERS. The body was located by the reporting agents approximately two miles south of the Interstate 80 at the Mitchellville interchange in a ditch next to a culvert.

— PENDING —

FACTS—

On December 25, 1968 at approximately 10:00 P.M. this reporting agent was telephonically contacted by State Police Radio at Cedar Falls and was given the message from So—sor Stump directing this reporting agent to report to the Grinnell Police Department at approximately 8:00 A.M. December 26, 1968 to assist Special Agent Mayer in the search for PAMELA POWERS.

On December 26, 1968 this reporting agent reported to the Grinnell Police Department at 8:00 A.M. and was subsequently met by Special Agent Mayer and this reporting agent was brought up to date on the details of this case. At the direction of Special Agent Mayer this reporting agent organized a search of an area on the west

the countyline, of Jasper on the east the county line of Poweshiek County and on the north seven miles north of Interstate 80 or Poweshick and Jasper County and on the south a line of seven miles south of Interstate in Poweshiek and Jasper County. It is the understanding of this reporting that a call had been put out for volunteers on December 25, 1968 to assist in the search of PAMELA POWERS and the people started arriving at the Grinnell Police Department at approximately 8:00 A.M. December 26, 1968 in response to a plea for volunteers. From approximately 9:00 A.M. to 3:00 P.M. searchers were sent out in teams from the headquarters at the Grinnell Police Department to designated areas in which they were to search. Some of these teams covered more than one area. Volunteers with snow-mobiles covered Interstate 80 both sides both north and south ditches of Interstate 80 and a median strip from approximately highway 146 east to the Kellog interchange. It is felt by the reporting agent that a search was necessary in this area due to the fact that clothing identified as being the property of Pamela Powers was found in the Grinnell interchange rest area in the eastbound side. Part of this area including approximately one hundred and eighty square miles of Poweshiek County and an area of two hundred and seven square miles of Jasper County were searched by the volunteers covering all roads, culverts, abandoned buildings and anyplace where a small person could be concealed with negative results.

At approximately 3:00 P.M. Special Agent Mayer and this writer met Special Agent Jutte at the Grinnell interchange where Special Agent Mayer and this writer were

brought to date on the details of the case by Special Agent Jutte.

Special Agent Jutte advised that the Des Moines detectives had the suspect in custody and were enroute from Davenport to Des Moines. I was instructed to follow the Des Moines detective car from Grinnell Interchange to Des Moines. The car containing the Des Moines detectives and the suspect started west on Interstate 80 with this reporting agent directly behind the vehicle, carrying the two Des Moines Detectives and the suspect, ANTHONY WILLIAMS. The car containing the suspect and the Des Moines detectives arrived at the interchange exited off the next interchange and came back over the interstate and were east bound on interstate 80 where they stopped at the Grinnell interchange rest area. In the car containing the detectives and ANTHONY WILLIAMS stopped this reporting agent pulled up directly aside their car and the Des Moines detective Arthur W. Nelson and this reporting agent went up to the walk to the rest area with an attendant and asked the attendant—tional clothing, in particular a blanket had been found. The attendant replied, no—clothing or blanket had been found and that the items previously found had been turned in to the Grinnell Police Department. The Des Moines detective, Nelson got back into the—with another detective and ANTHONY WILLIAMS and proceeded east on Interstate 80 with—agent directly behind their vehicle in this agent's state vehicle. At the Grinnell interchange the Des Moines car exited off the ramp over the Interstate 80 and was again west bound—Interstate 80 with the car containing Special Agent Mayer and Special Agent Jutte—behind the Des Moines car and this reporting agent directly behind the

agents' car—neared the Mitchellville Interchange the car containing Des Moines Detectives and then slowed down and exited off of the Interstate with Special Agents Mayer and Jutte behind the Des Moines Car and this reporting agent directly behind the agents' car. At the Mitchellville interchange the Des Moines detective car started north for a short ways then stopped—around and went south. I was directed by Special Agent Mayer to follow the Des Moines car south over Interstate 80. As we passed the filling station south of Interstate 80—the detective car stopped and Detective Nelson came back and asked that I in form Special Agent—and Special Agent Jutte to turn around and follow them as he (ANTHONY WILLIAMS) made a mistake and it was this way. This reporting agent so informed Special Agent Mayer and Special Agent—Jutte and they turned around and headed south over Interstate 80—first mile road south of Interstate 80 where a right turn heading west was made by—Des Moines detective car and this reporting agent's car. We went approximately a mile and a half where the Des Moines Detective's car slowed to a stop with this reporting—in his car directly behind him. Special Agents Mayer and Jutte pulled their car directly—began a search of the ditch for the body of PAMELA POWERS. A thorough search of the ditch was conducted by the State agents on both north and south sides of the road with negative results. The Des Moines detective Capt. Leaming came back and informed the agents that the suspect (ANTHONY WILLIAMS) had apparently made a mistake and they would go south yet another mile in the search for the body of PAMELA POWERS. The search was directed exactly one mile south of the spot that we had searched and the three cars, one Des Moines detective car and two state cars pulled up

to the ditch which was very similar to the one that we had previously searched and the three state agents, Special Agent Mayer, Special Agent Jutte and this reporting agent proceeded to search the ditch. The search had just begun when Special Agent Jutte found the body of the deceased, PAMELA POWERS. This was approximately 5:45 P.M. December 26, 1968.

It was decided by Capt. Leaming and Special Agent Mayer that a call should be out for Special Agent Newquist, Assistant Director Barton, Director Blair and Supervisor Stump to meet the agents at the spot where the body of the victim, PAMELA POWERS was found. Capt. Leaming also requested that the Des Moines Police Department Ident Squad also be contacted. Special Agent Jutte and Mayer went back to the Mitchellville interchange to the station to await the arrival state agents and identification personnel from the Des Moines Police Department so that they could be guided to the spot. IHP #294, two Des Moines detectives, the suspect, ANTHONY WILLIAMS, waited at the scene for the arrival of the previously mentioned personnel.

It is noted that the car containing the two Des Moines detectives and the suspect ANTHONY WILLIAMS was parked well ahead of the location where the body of the deceased, PAMELA POWERS, had been found.

Shortly after the call was put out for the additional state agents and Identification personnel from the Des

Moines Police Department they started arriving and the crime scene was processed by identification personnel of the Des Moines Police Department shortly after this reporting agent left the scene.

ENCLOSURES:

Exhibit #1 A County map of Poweshiek County with areas marked off for the search of the victim, PAMELA POWERS, in the above mentioned case.

Exhibit #2 A County map of Jasper County with areas marked off which had been searched by volunteer searchers in the search for PAMELA POWERS.

Submitted by Thomas R. Ruxlow,
Special Agent

HABEAS CORPUS EX. 12
BUREAU OF CRIMINAL INVESTIGATION
Department of Public Safety

Investigated: December 25, 26, 1968; Of Case: Homicide, Pamela Powers, W/F, Age Ten Years, Des Moines, Iowa, December 24, 1968; Petitioner's Deposition Exhibit #2, 7-16-81; Date: June 26, 1969, Typed: 6/27/69; Typed by: vi; File Number, 681353; Nature of Case: Homicide, Class, #7; Report Made By: Daniel L. Mayer, Special Agent; Approved: [initials].

Ten year old PAMELA POWERS was abducted from the YMCA in Des Moines, Iowa and her semi nude body later found in a roadside ditch near Mitchellville, Iowa. ROBERT ANTHONY WILLIAMS was subsequently arrested, charged and convicted for the first degree murder of PAMELA POWERS. ROBERT ANTHONY WILLIAMS, BCI #164 602, has been sentenced to a life term at the Iowa State Penitentiary.

— CLOSED —

FACTS—

This investigation was conducted at the request of Des Moines Chief of Detectives (Captain) Cletus Leaming and at the direction of Warren D. Stump, Supervisor of Agents, Iowa Bureau of Criminal Investigation.

At 1:30 P.M., December 25, 1968, the reporting Agent was contacted by Supervisor Stump and advised certain articles of clothing believed to be those of PAMELA POWERS had been found at the rest area for the east

bound lane approximately one mile west of the Grinnell interchange near Grinnell, Iowa. The reporting agent was further advised PAMELA POWERS was believed abducted from the YMCA in Des Moines, Iowa the previous day by ROBERT ANTHONY WILLIAMS, BCI #164 602, negro male, five feet eight inches, one hundred eighty pounds, black hair, dark brown eyes, date of birth March 19, 1944. The reporting Agent was further advised a warrant for child abduction had been issued against WILLIAMS at that time. The reporting Agent was directed to proceed to Grinnell, Iowa to assist in a search for PAMELA POWERS.

At 1:45 P.M., December 25, 1968, the reporting Agent was picked up at his residence in Keota, Iowa by Iowa Highway Patrolman Virgil Berhrens, (IHP #315) and transported to Grinnell, Iowa. At 2:45 P.M., the reporting Agent met with Grinnell Chief of Police Bill Peters, Des Moines Detective Spect, Special Agents William Faust and Vern Glossup (FBI) and Iowa Highway Patrolmen Kaylor (IHP #223), Law (IHP #362), Behrens (IHP #315) and Jasper County Deputy Sheriff Allan Wheeler and James Verwers. At this time the reporting Agent was briefed on the local articles of clothing which were preserved for the arrival of Special Agent Newquist of this Bureau. The reporting Agent was advised Iowa Highway Patrol officers had driven both sides of interstate highway 80 from Des Moines, Iowa to Iowa City, Iowa in an unsuccessful search for additional items.

A search was organized with its headquarters in Grinnell, Iowa to search for the body of PAMELA POWERS. This search was made also with the assistance of volunteers in the — PAMELA POWERS could be found alive.

The reporting Agent was further advised by Des Moines Police Detective Speck that the POWERS girl had been missing at approximately 1:30 P.M., December 24, 1968 and further that PAMELA POWERS is decribed as white female juvenile, ten years, four foot nine inches, sixty three pounds, dark blond hair, and blue eyes.

The search continued until approximately midnight on December 25, 1968. Also during this time FBI Agents Faust and Glossup, Grinnell Police Sgt. Butcher and Iowa Highway Patrol Kaler were making interviews of persons stating they had seen a vehicle similar to that described of WILLIAMS. The search was resumed at 3:00 A.M., December 26, 1968 in Grinnell, Iowa, with additional volunteers, the Newton Police auxilliary, additional Highway Patrol officers from District #11, District #13 and District #1.

At 8:00 A.M., December 26, 1968, Special Agent Ruxlow met with the reporting Agent at the Grinnell Police Department and assumed leadership of a search covering Poweshiek and Jasper Counties approximately seven miles north of Interstate 80 and seven miles south of Interstate 80, at the request of the Reporting Agent.

At approximately 3:00 P.M., Special Agent Ruxlow and the reporting Agent met Special Agent Jutte at the Grinnell Interchange at which time Special Agent Jutte advised of the -- of ROBERT ANTHONY WILLIAMS in Davenport, Iowa.

Special Agent Jutte and the reporting Agent in one car and Special Agent Ruxlow in another car followed the

car containing Des Moines Police Captain Leaming and Detective Agent Nelson and suspect ROBERT ANTHONY WILLIAMS. WILLIAMS eventually led the Des Moines Police two BCI cars and Iowa Highway Patrol Officer Jack Whissler (IHP #294) to a scene located approximately one mile south and one and one half miles west of Mitchellville, Iowa, at location Special Agent Jutte found the body of the deceased PAMELA POWERS at approximately 5:45 P.M.

Director Blair, Assistant Director Barton, Supervisor Stump and Special Agent Newquist were telephonically contacted by Des Moines State Police radio and requested to — investigators at the location of the body of the victim. Also contacted were the identification officers of the Des Moines Police Department. Upon the arrival of these personnel and photographing of the scene, the body was removed to a funeral home in Mitchellville, Iowa, for removal to Des Moines, Iowa for autopsy.

The reporting Agent was subsequently advised by Des Moines Police Captain Leaming that the autopsy conducted by Polk County Medical Examiner Leo Luka determined PAMELA POWERS had died of suffocation, after having had sexual penetration in the anus, mouth and vagina.

ROBERT ANTHONY WILLIAMS was subsequently tried and convicted in Polk County District Court of first degree murder. WILLIAMS was given the mandatory life sentence to be served at the Iowa State Penitentiary in Fort Madison, Iowa and was received there to begin the sentence on May 15, 1969.

Submitted by Daniel L. Mayer,
Special Agent

HABEAS EXHIBIT 13

(Testimony of Des Moines Police Officer Carroll
Dawson at 1969 Suppression Hearing)

[Printer's Note: Pages 188-89 of Original Transcript]

. . .

the day we're talking about.

A. December 26th, 1968, yes, sir.

Q. Now with whom did you go to this area?

A. Sergeant Gerald Limke and Technician—at that time Technician Charles Soderquist from my Bureau.

Q. Is it one of the duties of the Ident Bureau to take photographs?

A. Yes, sir, it is.

Q. When you arrived at the area, did you observe the body of Pamela Powers?

Mr. McKnight: Just a moment. So I won't have to just keep objecting, all the testimony relative to what was done in that area as the results of Leaming's call is objected to for all the reasons heretofore urged, then I won't have to continue to make them.

The Court: Agreeable. Same ruling.

A. I did see the body of Pamela Powers at that scene, yes, sir.

Q. And where was the body when you first saw it?

A. It was lying next to a cement culvert on the north side of the road that we were on, later known to me to be 54th Street in that area, about I would estimate twenty-five feet or so from the roadway itself in a ditch.

Q. And would you describe this body as you saw it?

A. Yes, sir. When we first arrived, it was partially covered with snow, partially nude except for the undershirt and sweatshirt on the upper part of the body. The rest of the body was nude. After the first initial photograph was taken, showing partially covered with snow, we did brush the snow away and take additional photographs.

Q. Lieutenant, I hand you what has been marked State's Exhibit K, and ask you to state what that is, if you know.

A. Yes, sir. This is the sweater or sweatshirt taken from Pamela Powers, from the body.

Q. Was it on the body at the time you first saw it?

A. Yes, sir.

Q. Did you later take possession of this Exhibit K?

A. Yes, sir, I did.

Q. And where was that?

A. At the Westover Funeral Home.

Q. I show you State's Exhibit L, and ask you to state what that is, if you know.

A. Yes, sir. This is the undershirt from the body of Pamela Powers, also taken from her body at the Westover Funeral Home.

Q. Was that undershirt on her body when you first saw it?

A. Yes, sir.

Q. Did either you or Sergeant Limke take some pictures at the scene?

A. On December 26th, the evening of December 26th, the * * *.

HABEAS CORPUS EX. 16
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 80-450-D

ROBERT ANTHONY WILLIAMS,
Petitioner,
vs.

DAVID SCURR, Warden of the Iowa State
Penitentiary at Fort Madison, Iowa,
Respondent.

DEPOSITION OF THOMAS R. RUXLOW,
taken by the Petitioner before Lou Anne Parker, Certified
Shorthand Reporter and Registered Professional Reporter
in and for the State of Iowa, commencing at 10:45 a.m.,
Thursday, July 16, 1981, at the 2nd Floor, Hoover State
Office Building, Des Moines, Iowa.

APPEARANCES

BOB BARTELS, Prison Assistance Clinic, University
of Iowa College of Law, Iowa City, Iowa 52240, appearing
on behalf of the Petitioner.

SARAH MEGAN, Prison Assistance Clinic, Student
at University of Iowa College of Law, Iowa City, Iowa
52240, appearing on behalf of the Petitioner.

TOM McGRANE, Assistant Attorney General, 2nd
Floor Hoover State Office Building, Des Moines, Iowa
50317, appearing on behalf of the Respondent.

Reported by: Lou Ann Parker, CSR, RPR

STIPULATIONS

Mr. Bartels: This is deposition in the case of Robert Anthony Williams v. David Scurr, Southern District of Iowa No. 80-450-D. We have two stipulations at the outset.

The first is that objections need not be made during the deposition in order to preserve them for trial except as to the form of the question.

And the second is that counsel for the Petitioner will retain the exhibits that are used at the deposition today pending trial.

Mr. McGrane: That's fine.

Mr. Bartels: Anything else?

Mr. McCrane: No, that's it.

PROCEEDINGS

[Printer's Note: Pages 4-50 of Original Transcript]

[Court Reporter marked Petitioner's Deposition Exhibits #1 through #5 for identification.]

THOMAS R. RUXLOW,

called as a witness by the Petitioner, being first duly sworn by Lou Ann Parker, Certified Shorthand Reporter and registered Professional Reporter in and for the State of Iowa, was examined and testified as follows:

Direct Examination

By Ms. Megan:

Q. State your full name.

A. Thomas R. Ruxlow.

Q. What is your present home address?

A. 6664 Crow Creek Road, Bettendorf.

Q. What is your current occupation?

A. Assistant Manager of Corporate Security for Deere & Company.

Q. Mr. Ruxlow, were you with the Iowa Bureau of Criminal Investigation in December of 1968?

A. Yes, I was.

Q. And you were assigned to investigate the disappearance of Pamela Powers on December 25 of 1968?

A. I was assigned on that investigation, yes.

Q. You reported to Agent Mayer; is that correct?

A. Yes.

Q. In Grinnell on December 26, 1968?

A. Yes.

Q. And he instructed you to take charge and to organize his search for the body of Pamela Powers?

A. That's correct.

Q. In Poweshiek and Jasper Counties; is that correct?

A. To organize the search. It was not limited to Jasper and Poweshiek Counties.

Q. Mr. Ruxlow, I'd like to ask you a few background questions about the search.

A. Okay.

Q. In order to prepare for the search you obtained maps of Poweshiek and Jasper Counties; is that correct?

A. Yes.

Q. And you determined what area you actually search in those counties?

A. I don't know as I determined the actual area. An area was determined and probably on the consensus of myself, Agent Mayer, and perhaps a few other law enforcement officers.

Q. And this area was roughly seven miles north and seven miles south of Interstate 80?

A. Yes.

Q. And you routed out—

Mr. McGrane: Are you going to lead him through all these?

Ms. Megan: Just for this background questioning.

Mr. Bartels: I don't think leading would be a proper—

Mr. McGrane: It's not a problem.

Mr. Bartels: I think in the circumstances of the deposition we could, but—

Mr. McGrane: Okay.

Mr. Bartels: Okay.

Q. [By Ms. Megan] Mr. Ruxlow, you grated out the area to be searched onto the maps that you obtained—

A. Yes.

Q. —is that correct? And volunteers had assembled in Grinnell to proceed with the search; is that correct?

A. Yes.

Q. And you assigned volunteers and groups of four to six to search the grids?

A. They were in groups. They could be as many as six and as few as three, and we had six whatever. Whatever seemed to work at the time depending on the people involved.

Q. And the searchers, the groups called in as they completed the search after a grid; is that correct?

A. Called or returned to the staging area.

Q. And you would check off the grids that had been searched?

A. Yes.

Q. And you would reassign searchers to search new grids?

A. Yes.

Q. The search was carried on this way from 9 until 3 o'clock that afternoon?

A. Yes.

Q. And you were instructed to go to the Grinnell interchange at 3 o'clock that afternoon; is that correct?

A. Yes.

Q. And you an Agent Mayer—

A. Mayer.

Q. —Mayer proceeded to the interchange at 3 o'clock?

A. Yes.

Q. And you were met there by Agent Jutte; is that correct?

A. One of the parties, yes.

Q. And at that time he informed you that Mr. Williams had been taken into custody and that the Des Moines detectives were taking him to Des Moines?

A. No, I don't think that's correct. I think we had already been advised that he was, in fact, in custody and then grouped back and then we were to meet them out there.

Ms. Megan: I am now going to hand Mr. Ruxlow what has been marked as Petitioner's Exhibit 1.

Mr. Bartels: Do you want to see that first?

Mr. McGrane: Okay.

Q. Could you identify that document, Mr. Ruxlow?

A. It's a report of the Bureau of Criminal Investigation research of the Pamela Powers homicide dated January 6 of '69.

Q. Whose report is that?

A. This is my report. It appears to be my report.

Q. Would you look at the second page of that report, Mr. Ruxlow, at the portion that I have marked off? I believe it's the first full paragraph and the first sentence of the second paragraph.

A. First full paragraph on the second page?

Mr. Bartels: The small one. There's three lines between the paper clips.

The Witness: All right.

Q. You state in your report, Mr. Ruxlow—

A. Go ahead.

Q. —that Agent Jutte advised you that Des Moines detectives had Mr. Williams in custody and were enroute from Davenport to Des Moines; isn't that correct?

A. Yes, but that's when stated in this, I think we were given this information over a period of time, probably by radio, and just restated that it came from Jutte. But I don't think it came at this particular time. It very well may have. I think we were aware that they were enroute and they did have Williams in there.

Q. But your report indicates that at that time Agent Jutte advised you?

A. Yeah, and I'm saying at this time, and I'm including the radio traffic that we had also with them, so it's a larger time span than what's indicated here.

Ms. Megan: Okay. I'm now going to show Mr. Ruxlow what has been marked as Petitioner's Exhibit 2.

Mr. McGrane: Okay.

Q. Mr. Ruxlow, this is Agent Mayer's report of the investigation. If you would look at the second page, fourth paragraph, I believe that I have marked off there.

A. Uh-huh, I see.

Q. Agent Mayer also states there that Agent Jutte advised him at the Grinnell interchange that Mr. Williams had been arrested; isn't that correct?

A. That is correct. Once again, we were aware of this way in advance of Agent Jutte actually arriving on the scene. We were aware of his arrest in Davenport much earlier.

Q. But the report indicates that it was at the Grinnell interchange.

A. Yes, it sure does.

Q. After you met Agent Jutte at the Grinnell interchange then you followed the car in which Captain Leaming and Detective Nelson and Agents Jutte and Mayer were riding; is that correct?

A. Nelson, if that is his last name, the detective, Captain Leaming at that time, I believe it was, and Anthony Williams were in one car. Agent Jutte was in his car, Agent Mayer was in his car, and I was in my car.

Q. And you all proceeded west at the interchange?

A. Yes.

Q. And you proceeded to where the body was eventually found; is that correct?

A. Yes.

Q. What did you do when you arrived at the sight where the body was found?

A. Went up and observed the body.

Q. Immediately from the time that you got out of your car you went up immediately and observed the body?

A. Uh-huh.

Ms. Megan: I'm now going to hand Mr. Ruxlow what has been marked as Petitioner's Exhibit 3.

Mr. McGrane: Okay.

Q. Mr. Ruxlow, this is a rough diagram not drawn to scale of the sight where the body was found.

A. Uh-huh.

Q. Does that agree with your recollection of it?

A. Well, it's very basic.

Mr. McGrane: It really is. Where are the trees and bushes?

The Witness: There's no other identifying landmarks except a culvert and an access road and a gravel road. This could be any one of a hundred areas in this immediate area.

Mr. Bartels: The intent is to show the relative locations of those three items. Does it appear to be accurate?

The Witness: Yes, I wouldn't say it's accurate. It's, I'd say there's a lot better evidence.

Mr. McGrane: We state it's a very gross representation.

The Witness: Yes, I guess that would be fair.

Q. Mr. Ruxlow, could you indicate on the diagram where you parked your car—

A. No.

Q. —when you arrived at the scene?

A. Huh-uh.

Q. Do you recall whether you passed the culvert before you parked your car?

A. No, I don't. I don't remember where I parked my car.

Q. When you got out of your car do you remember approaching the culvert from the north side or the west side?

A. Well, number one, this appears to be the traveled road, then there is of course a bank affair. And I don't know where the actual road surface ends and the bank affair begins. There is a portion that you can walk up to, and if I remember, walk off of the actual traveled portion of the road, the gravel surface, and onto what would be the sod surface. And I approached it from the south.

Q. So you recall approaching it directly?

A. I remember walking from the road up to the culvert.

Q. Up to the culvert?

A. Yeah, the culvert sticks out quite a ways and it's a fairly steep— It's a dangerous area right in there.

Q. Uh-huh.

A. And I did not walk into, you know, parallel with the road, because it was a crime scene and I didn't want to disturb the crime scene, whatever crime scene there may have been at the time.

Q. You don't recall walking in this direction, walking in an easterly direction?

A. I walked— No, I walked—

Q. From where to the culvert?

A. I walked to the culvert from south to north only to the distance of being able to walk up and look in and observe the body.

Q. Who found the body?

A. I was on the other road north, I believe it's north, looking at that same situation here where you had a culvert and a road which Williams had pointed out earlier as being the spot. I was still up there when Jutte advised me on the radio that the body was down here.

Q. So you were not present when Agent Jutte found the body?

A. No, I was, you know, a matter of a mile away. We just got in our cars and drove around, parked them, and I walked up and looked at it.

Q. Mr. Ruxlow, you were—where were you standing when you first saw the body?

A. Right in this area here.

Q. On the road?

A. Well, what's your definition of road? The gravel or the roadway? I guess we're going into semantics here, but it's important.

Q. No, I understand. Well, let's go— This is still the gravel road here and this is the—

A. Okay. Well, there's a considerable distance from what I have indicated here between the gravel road and the actual culvert. There's a grassy area which you have pictures that demonstrated what this was.

Q. And you were standing in this grassy area; is that correct?

A. Yes, I walked up just far enough to be able to observe the body and then walked directly out. In fact, I asked John Jutte, you know, where the body was and he said, "Well, it's up here." And I walked there and I tried to get to create no more disturbance than what he had done, and I tried to follow his same footprints and his same general path so we could both say we had been in that area.

Q. Mr. Ruxlow, taking into account the shortcomings of this diagram, could you make a mark where you would have been standing when you first saw the body?

A. It would be in this—

Mr. McGrane: Excuse me. If he's going to do that, let him show how far he believes that the culvert is from the road.

Ms. Megan: Fine.

Mr. McGrane: Because you have very little space from the edge of the—from where the culvert shows to the edge of the road, and he's indicated that there is quite a bit of stuff there that's not ditch and it's not culvert and it's not road. So can he mark that into as he thinks it would be? Otherwise, I think any marking where he stood is going to be deceptive on this.

Q. That would be fine. If you would indicate how far you believe it is from the culvert to the—

A. Okay. The ditch is—

Q. —road.

A. The ditch is about down there and the culvert then should be extended out, out a little bit further, because actually this culvert is actually covered up by the top of the roadway, and he is standing right about in this area here.

Ms. Megan: Okay. Mr. Ruxlow has marked with an X the spot where he believes he was standing where he first saw the body after he had modified the diagram.

I'm now going to hand Mr. Ruxlow what has been marked as Petitioner's Exhibit 4.

Mr. McGrane: I've seen it.

Q. Okay. Mr. Ruxlow, does this picture depict the scene as you recall?

A. Yes, uh-huh.

Q. Could you lay the photograph down? Thank you. Could you indicate on this photograph where you were standing when you first saw the body?

A. Right in this area right up in here.

Q. Could you mark an X with this pen where your feet would have been when you first saw the body?

A. Okay. Right about this area right here.

Mr. McGrane: You have big feet.

The Witness: Well, you know, this is not a good photograph for demonstration purposes. There are other photographs better that show the elevation. You are taking this from an angle that it's difficult to tell, because I can't see the elevation. If I had the photograph where it's looking directly at the end of the culvert. I could

probably show you much better where I stood, but generally it's in that area as far as this picture is concerned.

Mr. Bartels: That's fine for that.

Ms. Megan: I am now going to hand Mr. Ruxlow what has been marked as Petitioner's Exhibit 5.

Q. Mr. Ruxlow, does this photograph depict the body as you first saw it?

A. Yes, it does.

Q. Can you indicate where you were standing when you first saw the body?

A. About this area right here.

Q. Okay.

Mr. McGrane: What exhibit is that, 5?

A. It could have even— I have to enlarge this just a little bit. Be that particular area right there. I'm not—It's been 13 years ago. And I remember we walked up and we looked down. I don't remember if it was straight down or to one side or the other. It would be more over to this side than this side. I guess maybe take that out. That would be more accurate.

Ms. Megan: Mr. Ruxlow has indicated on the photograph by marking with a circle where he was standing.

Thank you, Mr. Ruxlow. I don't have any further questions.

Direct Examination

By Mr. Bartels:

Q. Okay. Let's start with Exhibit 5 again. Let me just continue with that, if I can. Your testimony is that this is the way the body was when you first saw it.

A. No. That's where the body was when I first saw it.

Q. Could you explain why it's not the way you saw it?

A. This area has been disturbed.

Q. And how has it affected the appearance of the body?

A. It appears it's been—snow has been removed from the body. This area is more trampled down than what it was when the detectives from Des Moines Police Department in that section arrived. It was much more trampled down and much more disturbed as was this area here as was the body.

Q. Your testimony for purposes of the record, then, is that most of the area within three feet of the body has been disturbed to some extent?

A. I'd say so, yes.

Q. And I take it you are also testifying that snow was brushed away from the body before this picture was taken?

A. Yes.

Q. That there was more snow on the body?

A. Yes.

Q. When you first observed it?

A. Yes.

Q. Mr. Ruxlow, let me hand you back Exhibit #1 again, which you earlier identified as something that appeared to be your report on this matter. I take it it was the custom in the BCI at the time to make this sort of report?

A. Yes. It's been vastly improved since this time, period.

Q. And then those reports were kept in the files of BCI in the regular course of the BCI business?

A. That's correct.

Q. And I take it that this report then would indicate that you actually dictated this report or perhaps wrote it out on January 6 of 1969?

A. That would appear to be the case, yes.

Q. And I take it you would have done that from some notes that you had?

A. Yes.

Q. Do you have any idea where those notes would be now?

A. No. Those—Any files that I had, and I had some of my original files when I moved, when I was promoted and moved to Des Moines in about '73, I think most of those were destroyed at that time.

Q. And I take it it was your custom and you made out these reports to make them as accurate as you could—

A. Yes.

Q. —from your notes? And handing you Exhibit

#2, I take it again this is the exact same kind of report that we've just been dealing with in Exhibit #1?

A. It is a copy of an official report.

Q. Right. And again this would have been in the regular course of business for Mr. Mayer to make this kind of report?

A. Yes.

Q. And it would be the regular course of BCI business to keep the report in the files?

A. Yes.

Q. Mr. Ruxlow, in December of 1968 or more specifically the 25th and 26th, what were your normal working hours?

A. The scheduled working hours were 8 to 4:30 Monday through Friday with the exception of holidays. The normal working hours were any time that you were called out.

Q. Okay. So you are testifying that you had a sort of a regular—I don't know if I want to call it a shift, but a time when you were supposed to be working, 8 to 4:30, but you also were accustomed to being called out?

A. That's right.

Q. For additional hours? On December 26 were you acting under Nick's direction or supervision?

A. Yes, Special Agent Mayer.

Q. And would Agent Jutte have also directed you? Would he have been a superior?

A. No, no. In fact, you go by more or less seniority to one extent and what we call a case agent. Case agent really is the one that directs the activities, and you could have a junior agent, more or less, directing the activities of a senior agent. In this particular case Agent Mayer was the senior agent, and I think he was what we call the ticket holder, the man that had the assignment slips on this particular case, so he was the one that was probably directing Agent Jutte.

Q. Okay. Now, I want to go back to that time around 3:00 in the afternoon on December 26.

A. All right.

Q. At that time you got a call to meet Officer Jutte or Agent Jutte at the Grinnell interchange; is that correct?

A. That's correct.

Q. And at that time you discontinued the search?

A. No. At that time we left the Grinnell Police Department and met them down there.

Q. Do you recall when the call came?

A. We didn't have too much notice. It was Jutte and then, I believe, and I don't mean to be mistaken. It was something to the effect that Jutte and the Des Moines detectives want to see you down at the Interstate 80 truck-stop.

Q. Okay. Then that was the nature of the message, just that they wanted to see you?

A. Yeah, and Mayer and I drove our cars down there to meet with them.

Q. And when you got to the Grinnell interchange you had some conversation with Agent Jutte?

A. That's correct.

Q. And it was determined that you would follow the other cars west towards Des Moines at that time; is that correct?

A. That's correct.

Q. And at that point when you then started toward Des Moines the search effectively was discontinued; is that correct?

A. No, no, it's not. It was just more or less left in the status that it was when I left the building.

Q. Which was that it would end at the Polk County line; correct?

A. Well, everything that we had put in motion at that time would continue, if you will. Nobody said stop searching. Just everything was left in motion.

Q. But the grids that had been made related to Jasper County?

A. That's correct, at that particular time.

Q. And essentially the search was going to come to a halt when the volunteers came back and there was no further direction for them to do anything; is that correct? That that was essentially the way the search was going to end at that time?

A. That's the way it wound up ending. That was not the design of it. I had specific orders to search Interstate 80, and that's what I had planned to do is to continue that search. But was interrupted by the arrival of Jutte and the request to accompany him.

Q. When did you get those instructions to search Interstate 80?

A. That was given to me that morning.

Q. At around 8:00?

A. Yeah. The only reason that the thing stopped when it did was that we were interrupted. And it was not stopped. Officially it was left hanging, so to speak.

Q. And now as of 8:00 then on December 26 the instruction was to continue on into Polk County?

A. No, my instructions were to search Interstate 80. And they were particularly interested in from Des Moines to the Grinnell area.

Q. Which would have included Polk County.

A. Yes.

Q. What I'm asking is whether you were instructed to search on into Polk County.

A. My instructions were general, to search. And my plans had been to search Poweshiek, Jasper and working on into Des Moines.

Q. And that was from 8:00 when you first took over?

A. That's correct.

Q. You received the instructions that you received from Agent Mayer, I take it.

A. There were several people had input to that. I know the director of the Bureau at that time was in communication with us. So it was just not in that particular situation that Mayer and I— We had input from other supervisory personnel of the Bureau.

Q. Mr. Ruxlow, did you review your report, this report that we've been referring to as Exhibit #1, before you came here today?

A. I have glanced at it. I haven't reviewed it in detail.

Q. When was the last time you glanced at it?

A. This morning.

Q. And I take it you believe this to be your report that you made?

A. Yes, I do.

Q. Okay. Now, it's your testimony that—

Mr. McGrane: Go ahead. I just—Do you mind if I look at this while you are asking?

Mr. Bartels: No, I just wanted to know if you wanted me to stop while you were looking at it.

It's your testimony they intended to go into Polk County if you weren't successful in Jasper and Poweshiek Counties; is that correct?

A. That was my intention, yes.

Q. And that the reason you didn't do that was that you got called to the Grinnell interchange and then were directed to follow the other officers or go with them toward Des Moines—

A. That's correct.

Q. —is that right? Now, at 3:00 on the 26th of December of 1968, I take it you didn't really know whether Pamela Powers was dead or alive.

A. No, I had no way of knowing.

Q. And I take it there was also some, at least some prospect of snow that day?

A. I don't remember the prospect of snow as much as I remember the weather conditions of that particular date. It was slick. The highways, the interstate particularly were very slick. And I don't remember what that attributed to, a snowfall or a sleet or a rain.

Q. And yet you suspended this search at 3:00?

A. No, I did not suspend the search at 3:00. I left the search. I left the command post at 3:00.

Q. I take it from your testimony at the earlier motion to suppress that you knew there was nobody else there at the time to continue to coordinate and organize the search.

A. Well, see, when we left we anticipated coming back, so everything was left in motion. When they asked us to go with them we didn't anticipate, at least I didn't think we were going to be gone quite that long. The road conditions slowed our travel from there to the spot where her body was found, and it just got later and later and it was obvious that Mr. Williams was going to point out the location of the body to us, and so we just went on with the business at that time. And in fact, I left my maps and such back at the police department.

Q. When you started on this trip from the Grinnell interchange how long did you think you were going to be gone?

A. No, I didn't anticipate we were going to be gone all that long.

Q. Where did you think you were going?

A. I really didn't know.

Q. Now, what was your purpose in going with these other officers? What purpose did you feel you were serving?

A. We were leaving one of us to accompany him. We really weren't told the purpose. And I was in doubt as to why we were getting involved where we were going. I have my suspicions that Williams may be leading us to the body, but I wasn't sure. I had no way of knowing. I wasn't told specifically, just the impression that I had. I didn't know where that was.

Q. Did you question why you were going to go with them?

A. No.

Q. Was it your decision whether to go with Leaming—

A. No.

Q. —and Jutte? Whose decision was it?

A. It was Leaming's request and we complied.

Q. Who could have said no?

A. Any one of us, I suppose.

Q. So you were not directed by Agent Mayer to do this, I take it.

A. Well, I'm not sure of that. We met them there and they asked us to go, and everybody just went. And then I'm not sure anybody gave any specific direction to go or not to go. We really weren't given that much information.

Q. I take it Agent Mayer upon getting Captain Leaming's request decided to go.

A. Yes.

Q. And you went with him?

A. Yes.

Q. And in the end if it had come to it, it would have been Agent Mayer's decision whether to go with them or go back to Grinnell; is that correct?

A. Yes.

Q. Now, you said you had some feeling and in terms of why you were following Detective Leaming and Agent Jutte. You said that you had some feeling that Mr. Williams might lead them to the body.

A. Yes.

Q. I take it there was really no need for you to go with them in terms of securing the area.

A. I didn't know. I just got the general impression because of lack of information and desire to get going down the highway that he had either indicated that he was going to show them where the body was or that he maybe told them where it was or that he had a feeling

that he was going to tell them. I don't know, but just that general situation. That's what my beliefs were.

Q. And the lack of any other explanation that you could think of?

A. Yes.

Q. It wasn't anything that Captain Leaming said to you?

A. No.

Q. Do you think it made sense to suspend the search for that girl that you didn't know the condition of whether to follow those officers to Des Moines toward Des Moines?

A. The search was not suspended. It was still going on. The crews that were out were still going on, so that the search was not suspended. I—

Q. Wouldn't you have had to have anticipated, given your testimony at the motion to suppress, that there wasn't going to be anybody else there after you and Mayer left who could conduct this search? Didn't you have to anticipate that if you were gone for any length of time that the search was going to come apart in terms of organization?

A. It would conclude up to the point it had been organized.

Q. Which was to the Polk County line?

A. To the Polk County line at that time, yes.

Q. So that when you left you knew that, and you have testified already you didn't know how long you would be gone; is that correct?

A. That's correct. I didn't anticipate being gone as long as we were.

Q. But you didn't know how long you were going to be gone?

A. No.

Q. And you also knew that if you were to go on for a substantial length of time that that search had only been organized to the Polk County line; is that correct?

A. That's correct. At that time.

Q. Now, what I'm asking, did it seem to you to make sense to do that when the girl might still be alive?

A. Well, if you want to talk about the probability of the girl being alive, we all felt at that time it would be nil.

Q. But you didn't know that she was dead? There was some possibility that she was alive; isn't it?

A. It was possible, but not very probable given the circumstances and the weather and no clothing. Let me say this, based on my experience the probability factor would be about zero.

Q. Assuming, I take it, that she had been outside that entire time—

A. That's correct.

Q. —and you didn't know whether that was true; correct?

A. No. Well, we had the indication that she probably was based on the fact that her clothes had been disposed of at the Grinnell rest area, which indicates that he was disposing of them as he was going along.

Q. And that relates to whether she would have been inside or outside?

A. Yeah, from that we had anticipated that she was probably outside.

Q. Let me just make sure I've got one other thing clear. That if a question had been raised at the Grinnell interchange about whether you should do this, go off on this trip with Captain Leaming—

A. Uh-huh.

Q. —that it would have been Agent Mayer's decision whether you did it?

A. I believe that's correct, yes.

Q. Mr. Ruxlow, do you recall testifying at the motion to suppress in 1977?

A. Yes.

Q. Prior to testifying did you discuss the case with somebody from the prosecution?

A. I probably would have, yes.

Q. Do you recall who that was?

A. I think Blink was the one, Rob Blink, was the one that handled the trial, so it would have been him.

Q. And I take it you got together with him before the suppression hearing and discussed your testimony with him.

A. Didn't discuss the testimony. Discussed the facts of the case.

Q. Okay. You discussed what occurred out there?

A. That's correct.

Q. And what explanation did he give you about what the suppression hearing was about?

A. That through my search, which he hadn't realized until after the court overturned the conviction that he realized that the body would have eventually been found. And they needed my maps and my testimony to demonstrate that.

Q. So they understood that what Mr. Blink had to show was that the body would have been found through your search if it had continued?

A. That's correct. Which the information was available back in 19—. Whenever the first trial was.

Q. Did you discuss this deposition with Mr. McGrane?

A. Oh, yes.

Q. Beforehand?

A. Yes.

Q. And can you tell me what the nature of that discussion was?

A. About the facts of the case, what I had done that day.

Q. Just you went over the facts with Mr. McGrane?

A. I think so.

Q. Did he give you an indication as to what this deposition was about?

A. No. In fact, he didn't know except that you had some pictures that you wanted to show me.

Q. Did you see any of those pictures before the deposition?

A. Those pictures, no.

Mr. McGrane: Hold it. Are you sure?

The Witness: Not those pictures. I have seen pictures that are available through the police files.

Mr. McGrane: Some of them are duplicates of those; aren't they?

The Witness: Yes, uh-huh.

Q. Okay. Let me— Before you came to this deposition today and after you knew that you were going to have to come here did you look at a picture that was the same as Exhibit #5?

A. I'm not sure if it's the same, but I looked at a series of pictures which this appears to be—to have been one of them. I can't say that that is the exact picture.

Q. Okay. And where did you get that picture?

A. I was over at the Bureau office reviewing the file to kind of update myself and also to ask Speed Leaming to bring up his copies of the photograph since

ours was not available. Our file had been cannibalized for the trial. We had no pictures.

Q. Okay. So Detective Leaming, Captain Leaming brought some pictures over?

A. Yes.

Q. And he got those from the Des Moines Police files?

A. From his file and/or the county attorney's file. Which were some of the same pictures that we at one time had in our files that were no longer available.

[Discussion off the record].

Q. Okay. Just one more thing. You indicated that you went over to the—what's now the Division of Criminal Investigation; is that—

A. That's correct.

Q. And looked through that file—

A. That's correct.

Q. —there? Did that file include your report?

A. Yes.

Q. Did it include Agent Mayer's report?

A. Yes.

Q. Did it include anything else?

A. The file is old. It's really—What you see is examples of what is in there. I didn't feel there was anything all that significant in there. I felt as an ex-law enforcement officer before giving testimony in this matter.

Q. I'm not asking for—I'm just trying to identify what materials you have seen.

A. There wasn't anything of that significance in there. When I saw that report, I have seen it so many times I just glanced through it and there wasn't anything significant in there. I didn't spend much time on it. I didn't have those pictures available to refresh my recollection.

Mr. McGrane: There was other material in the file.

The witness: Yes.

Q. And can you describe to me what the material in the file was?

A. Miscellaneous reports, some dealing with the retrial in '77, I believe.

Q. Uh-huh.

A. Locating witnesses, reinterviewing them, some miscellaneous stuff. And that being, I think, the majority of it.

Mr. McGrane: Let's go off the record.

[Discussion off the record.]

Q. Okay. Let's go back on. Besides the pictures that Mr. Leaming brought you from the Des Moines or from wherever, and besides the material in the DCI files, did you review any other documents?

A. I reviewed my testimony at the suppression hearing.

Q. And that's the 1977 suppression hearing that you are talking about?

A. Yes.

Q. Anything else besides those three categories?

A. No.

Mr. Bartels: Okay. Do you have anything?

Mr. McGrane: I have a couple.

Cross-Examination

By Mr. McGrane:

Q. Your reference in there is that you met Agent Jutte at 3 p.m. Now, did you meet him at 3 p.m. or did you get the call at 3 p.m. or do you know?

A. It's— At this time, you know, I'd have to say that if I stated in there I met him at 3 p.m., I probably met him as 3 p.m.

Q. Okay. And now did you go from meeting him at 3 p.m. did you go directly from there to the place where the body was found?

A. No.

Q. What did you do in the meantime?

A. There was a question about some clothing having been dumped out at the trash receptacle as I believe it was a Texaco station. And they were looking for some articles of clothing in the immediate trash area, but I believe that the trash has been since disposed of and so that— We saw Speed there and at that time everyone said, "come on, let's go. We're going on west."

Q. This is at a Texaco station at an interchange?

A. I believe it is.

Q. Now, there's reference to rest stops and interchange. Did you also stop at a rest stop?

A. No. Well, I don't remember. The rest stop, I believe, was covered earlier because the clothing had been found by the rest area attendant earlier, which led us to searching Interstate 80.

Q. Okay. Now, where did you go from stopping at the Texaco station?

A. We drove west on Interstate 80.

Q. And there were how many cars?

A. Well, there would be a car with Leaming and Williams Jutte had a car, I had a car and Mayer had a car.

Q. How about highway patrol?

A. There wasn't any at that time.

Q. Did you meet highway patrolmen later?

A. Yes.

Q. Before you got to the scene where the body was found?

A. Yes, uh-huh. They called him in to assist us because he was familiar with that general area.

Q. Was there another stop between the Texaco station and where the body was found?

A. Yes.

Q. Where was that?

A. An area I believe about one mile north of that, an area very similar to that particular area which he had—Williams had directed us to earlier claiming that the body was in fact, there.

Q. And what was done at that area?

A. We all got out and looked with, of course, negative results.

Q. How long do you believe you spent there?

A. Oh, quite a while. Quite a while. We looked up and down the ditches and in the culvert and around the culvert and in the immediate area. We looked at the most obvious place and expanded it because he said that's where it was.

Q. And then the people left that area?

A. Yes. Leaming, Jutte and Whistler, those three vehicles.

Q. Whistler is—

A. Iowa Highway Patrolman. Went to the next road over because it had a similar layout as the one Williams had described the body being dumped at.

Q. And did everybody leave at once?

A. No, Mayer and I stayed there and continued to look in that particular—

Q. When did you leave there?

A. After Jutte called us and said the body was down there.

Q. And then you proceeded to the area where the body was found?

A. Yes.

Q. And you said you had—you had been extremely careful not to disturb the crime scene; is that correct?

A. That's correct.

Q. Had the area or snow around the body been disturbed when you got there?

A. No.

Q. Now, would you describe this area for us, this large—large area within a quarter mile either side, what kind of area are we talking about?

A. Has a gravel road going east and west, cornfield obviously on both sides. No buildings in the immediate area at the time the body was found, but are those pictures of the general area?

A. Yes.

Q. Okay. Now, can you identify where that culvert is on Exhibit A?

A. Yes. It's down below this, what I'll call this tree line area.

Q. There is a tree line there?

A. Yes. A tree, bush, scrub brush.

Q. Okay. Now, does that indicate to you as a person who has grown up in Iowa that there's liable to be a culvert in that area?

A. Yes, because of the tillage around the area which leaves the grass for the water flow-way.

Q. But the tillage wouldn't show in the wintertime?

A. No, but this brush and such would.

Q. And that would indicate to you a culvert?

A. That would be one of the indications.

Q. Okay. And that's also shown on Exhibit B?

A. Yes.

Q. In some more detail?

A. Yes.

Q. Okay. Now, on your report there is some question as to what you were told at the exchange by Agent Jutte and what you may have been told before. Does the report also reflect incidental contacts?

A. No, it's kind of a general— At that time it was a general.

Q. And you worry about detail when in a report?

A. In specific interviews or specific situations. This was just to indicate that we had a meeting and we exchanged some information.

Q. Okay.

A. The details would be brought out at a later portion of the report if necessary.

Q. I think you have already clarified this one, but you described that one picture, Exhibit 5, I think it's 5, as depicting the body as it was when you first saw it.

A. No.

Q. You had, in fact, that— Would you clarify that again?

A. Okay. The body is in the position when I— It reproduces a position of the body when I first saw it. Only the position of the body.

Q. So all the disturbances from later—

A. Yes.

Q. —when you stopped the search or you left the search headquarters at Grinnell, what was the posture of the searcher? Where were the searchers?

A. They were out.

Q. They had not all reported back in?

A. No. They were people that had just left, people that had just returned, people getting coffee, people still out. You know, just in the middle of the search.

Q. What time had the last searchers been sent out, do you recall?

A. They were constantly being sent out. They were to report back in either by phone or in person. The area that they had searched would be checked off. They would be given a new assignment. They would be getting coffee, taking a rest stop, what have you. It's a continuous activity that you would have in a situation of that type.

Q. Did you do anything in reference to the search again after that?

A. No.

Q. Did you leave your materials at the scene?

A. Yes, I did.

Q. And you had to go back and pick those up?

A. Yes, along with all my notes and such.

Q. And your maps?

A. In the teams, yes.

Q. In other words, you had just taken your body out of the scene and left your—all your equipment and everything there?

A. That's correct.

Q. Okay. How long had you been in the BCI at that time?

A. I joined BCI December 1 of 1967.

Q. So you had only been there about a year?

A. Yes.

Q. When you were told to search you continued to search until somebody told you to quit; is that correct?

A. That's right, yes.

Q. Or as ours is not to reason why?

A. I had a job and that was to organize the search along Interstate 80, and that's exactly what I did.

Q. Had you had experience on searches?

A. No.

Q. Why?

A. I had experience at Cedar Rapids Police Department and I had military service.

Q. And you had done grid searches like this before?

A. Yes.

Mr. McGrane: I think that's all I have. One more question.

Q. The grids were not necessarily the limit of the search; were they?

A. No, they were general and they varied from section to section because of the roads and because of the rain and the accessibility to that particular location.

Q. Were all the grids on those maps searched?

A. No. The ones that were checked were. Some of them I had gridded out and then disregarded based on input from the local officers.

Q. And you, in fact, did not search around like where the grids included the city of Newton?

A. No, we left that for a— We wanted to get moving on down the road. We felt that that was not a higher priority of searching along Interstate 80 from the officers, so we worked around like Grinnell, Newton so that we could come back and pick those up, if necessary.

Q. Did you assign these grids in a line order going on Interstate, like start 1, 2, 3?

A. I think I started— I'd have to look at my map to refresh my recollection, but I think I started at Grinnell and went east and west and then got as far as the Iowa-Poweshiek line and then went back west of the Iowa-Poweshiek county line.

Q. You stopped at the Iowa-Poweshiek county line?

A. That's all the further east I was going to go.

Q. Why?

A. The clothing had been found at the Grinnell rest area which was west of Grinnell, and we surmised that the articles of clothing would be the last articles he would get rid of, so we felt that we should be searching from Grinnell.

nell, cover Poweshiek County but not go east onto Iowa County but concentrate our efforts first west.

Q. How far west?

A. Well, back to Des Moines where he started from.

Mr. McGrane: Okay, that's all I have.

[Court Reporter marked Petitioner's Deposition #6 for identification.]

Redirect Examination

By Mr. Bartels:

Q. Mr. Ruxlow, I'm handing you what's been marked Petitioner's Deposition Exhibit #6 and which is Exhibit I from the motion to suppress hearing. This is a map of Jasper County. This is the actual map that you gridded out; is it not?

A. That's correct.

Q. And I take it, then, each grid where there is a check mark, the searchers reported back to you that they had searched; is that correct?

A. Yes.

Q. Now, calling your attention to— Well, I'll point to it.

A. Okay.

Q. There's a line of shallow boxes along the—toward the southern end of the county marked 40, 39, 38, 37 going west to east. Are those checked off?

A. No.

Q. Or are those stricken?

A. Those were stricken.

Q. Those were the ones that were gridded out and told you to be searched; is that correct?

A. Yes, this one here at 37, there's really no roads in it and it wasn't— As I was gridding them out I was more concentrating on grids that could be worked and didn't recognize that there wasn't any roads in there. And there's a town right there like this one here, there's Prairie City. And we felt that I was getting a little bit out of my, what I had set up in my own parameters, I was getting a little to much distance in there to cover, so those were eliminated. When you see Exhibit 30 here, there were three teams out there that checked that particular area.

Q. Why would that have been?

A. I'm not sure. There is a— There's three separate teams that all reported back in. Maybe there was a few numbers that particular team or the equipment they had to work with. I'm not sure. There were a lot of variables that had to be taken into consideration.

Q. Okay. Let me just make sure about one thing. When you left the Grinnell interchange to travel, you traveled first west on Interstate 80; is that correct?

A. That's correct.

Q. And then, as I recall, the earlier testimony perhaps of Officer Jutte, you actually got off the Interstate, turned around and went back east for a while; isn't that right?

A. I don't remember that. If you are addressing the Mitchellville area, we might have missed a turn, but as I

recall, we got back in—when we got onto 80 my recollection is that we went westbound and I don't remember us getting—

Q. And the Texaco station would have been someplace west of there, then?

A. No, the Texaco station is at the Grinnell interchange.

Q. Okay. And you don't recall going to the rest stop?

A. We may have. We may have. I spent a lot of time there and we very well may have.

Q. Okay. Now, when you left the Grinnell exchange in any event, you didn't really know what the purpose of it was; is that fair?

A. No, I didn't. I wasn't told what the purpose was. I had a feeling what the purpose was.

Q. And your feeling was maybe because nobody told you you had anything else, that maybe he was going to take you to the body?

A. Yes, that the way the whole situation was handled, hurry up, let's go, we've got something coming up down the line, we want to get it done.

Q. And I take it at that point in terms of the number of officers who were already around, there really wasn't any purpose for you to be along if he was going to take you to the body?

A. I don't know if it was a general area and he wasn't sure about the specific location within that general area.

Q. But you don't know any purpose?

A. No, huh-uh.

Mr. Bartels: Okay.

Recross-Examination

By Mr. McGrane:

Q. My turn. On this Jasper County map, Mr. Ruxlow, the grids are checked all the way up to the Polk County line; is that correct?

A. That's correct.

Q. As having been searched?

A. That's correct.

Q. Did you make all the checks before you left at 3 p.m.

A. No.

Q. Would you tell us when you made some of those?

A. In the course of organizing the search the people would report to the Grinnell Police Department. They would be assigned into teams and then their names would be logged on a sheet of paper. And then they would be given a small replica of this map with the area marked out and the number and asked to go out and search that area. Then they would report back and then they would say, "I'm Ruxlow and we had area 21." That would be checked off and asked if they would care to go out again.

If they would, then the new area would be assigned and we just kept a running tab along the margin with that particular group so we know what group was assigned to what particular area.

I had personnel where the Grinnell P.D. were assisting me and when they come in, they would sometimes mark off the—draw a line through the number and I would talk to them and ask them if they would go out again, get them a new area, get them a new map.

Q. When you left you left no particular police personnel in charge; did you?

A. No, no. We just went out to meet them and did drop from that point.

Q. But searchers could report back?

A. Yes, uh-huh.

Q. And when they reported back who would they report to?

A. Well, that main room and whoever was helping me at the time would cross out the corresponding numbers next to the teams.

Q. But you would have left nobody in that main room to take over when you left?

A. No, it was just more or less up in the air and it was such a short time and we never came—

Q. So the searchers happen to report to whoever would be available?

A. Yes.

Q. And when you came back to pick up your work papers and your maps were there indications that people had come in your absence after finishing searching their area?

A. Yes.

Q. And what did you do?

A. Well, I updated my map and for my report.

Q. From the work papers that you had left there and the other people had filled in?

A. That's correct.,

Mr. McGrane: Okay. That's all.

Further Redirect Examination

By Mr. Bartels:

Q. Do you recall which county or which grid you checked off after you got back?

A. No, I don't.

Q. Just a second. Mr. Ruxlow, did you and Mr. McGrane discuss anything besides this matter of when the check marks were made—

A. No.

Q. —during this last interval?

A. No.

Mr. Bartels: Okay. Anything more, counselor?

Mr. McGrane: Not any more.

[The record was closed at 12:14 p.m., Thursday, July 16, 1981.]

[The reading and signing of this deposition has been waived.]

CERTIFICATE

I, the undersigned, a Certified Shorthand Reporter and Registered Professional Reporter of the State of Iowa, do hereby certify that there came before me at the time, date and place hereinbefore indicated, the witness named on the caption sheet hereof, who was by me duly sworn to testify to the truth of said witness' knowledge touching and concerning the matters in controversy in this cause; that the witness was thereupon examined under oath, the examination taken down by me in shorthand, and later reduced to typewriting under my supervision and direction, and that the deposition is a true record of the testimony given and of all objections interposed.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

In witness whereof I have hereunto set my hand this 25th day of July, 1981.

LOU ANN PARKER
Certified Shorthand Reporter
Registered Professional Reporter

HABEAS CORPUS EX. 17
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROBERT ANTHONY WILLIAMS,

Petitioner,

v.

DAVID SCURR, Warden of the
Iowa State Penitentiary at
Fort Madison, Iowa,

Respondent.

STATE OF IOWA, COUNTY OF POLK, ss

Civil No. 80-350-D

AFFIDAVIT

I, Gerald W. Crawford, being duly sworn, hereby depose and state as follows:

1. I am an attorney licensed to practice in the State of Iowa. I was so licensed at all times referred to below.

2. In April of 1977, I was appointed to represent Mr. Robert Anthony Williams in the retrial of *State v. Williams*, Polk County, Crim. No. 55805-69. Also appointed as co-counsel were Mr. Roger Owens and Mr. John Wellman of the Polk County Offender Advocate's office. The trial judge in that case was the Honorable J. P. Denato.

3. Following the trial of the *Williams* case, I had occasion to speak with Judge Denato about a probation revocation matter relating to another case. During that conversation, Judge Denato raised the *Williams* case.

4. During our conversation, Judge Denato and I discussed the appeal in the *Williams* case, and particularly the issue of Judge Denato's ruling on the defense's motion to suppress the evidence found on the victim's body. I commented to Judge Denato that the prosecution had not given him the best record on which to base his ruling, and he responded that I was the master of understatement. Judge Denato also said that if he had been prosecuting the case, he would have called many more witnesses to establish the record.

5. During the same conversation, Judge Denato stated that he thought we would prevail on the suppression issue on appeal. He later referred to our chances of prevailing on that question as at least 50-50.

6. In the context of the conversation referred to in the preceding three paragraphs, I believe that Judge Denato's comments went to both the quality of the lawyering by the prosecution and to the quality of the record on the issue of whether the victim's body would have been found "in any event."

7. Prior to the trial in *State v. Williams*, I travelled to Cedar Rapids to attempt to gauge community sentiment about the case. At that time, I spoke with a number of individuals. I also spoke with Cedar Rapids residents by telephone from Des Moines. These inquiries did not provide me with any real indication one way or the other as to whether Mr. Williams could receive a fair trial in Linn

County. I was not able to think of any other means of determining whether Mr. Williams could receive a fair trial in Linn County besides opinion polling.

Gerald W. Crawford

Subscribed and sworn to before me this ____ day of _____, 1981.

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Civ. No. 80-450-D

ROBERT ANTHONY WILLIAMS,
Petitioner,
vs.

DAVID SCURR, Warden of the Iowa State
Penitentiary,
Respondent.

MEMORANDUM IN SUPPORT OF PETITION

• • •

(p. 16)

III.

THE STATE COURT'S ADMISSION OF EVIDENCE
RELATING TO THE VICTIM'S BODY VIOLATED PE-
TITIONER'S RIGHTS UNDER THE FIFTH, SIXTH,
AND FOURTEENTH AMENDMENTS.

• • •

(p. 21)

B. *The "Inevitable Discovery" Test Applied by the State Courts was Constitutionally Impermissible.*

In affirming Petitioner's conviction after retrial, the Iowa Supreme Court agreed with the district court that the victim's body and evidence derived from it were admissible under the "inevitable discovery" doctrine, or "hypothetical independent source rule." 285 N.W.2d at 256-262. As articulated by the Iowa Supreme Court, this doctrine involves a two-part test under which the State must show (a) that the police did not act in "bad faith," and (b) that "the evidence would have been found without the initial lawful activity and how that discovery would have occurred." As the Iowa Supreme Court recognized, *id.* at 262, the hypothetical inevitable discovery doctrine has never been endorsed by the United States Supreme Court; nor has it been endorsed by the Eighth Circuit Court of Appeals. This is hardly surprising, since adoption of the inevitable discovery exception would be wholly inconsistent with decisions of the United States Supreme Court concerning the Fifth and Sixth Amendment and the "fruit of the poisonous tree" doctrine.

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(p. 24)

Application of the constitutionally appropriate fruit-of-the-poisonous-tree standards to the instant case shows that the victim's body and the evidence derived therefrom should have been excluded from the trial. In this regard, *Brown v. Illinois*, 422 U.S. 590 (1975), is especially instructive. In *Brown*, the defendant was arrested, without probable cause, at about 7:45 p.m. Following repeated *Miranda* warnings, he gave two incriminating statements,

first at about 9:00 p.m., and the between 2:00 and 3:00 a.m. the following day. The Court reversed Brown's conviction, holding that both statements were fruits of the illegal arrest, and that the *Miranda* warnings did not sufficiently attenuate the taint. 422 U. S. at 604-605. The Court stated that in determining whether the "casual connection between the illegality and the confession" had been broken "for Fourth Amendment purposes," the *Miranda* warnings were important but not dispositive, and that at least three other factors were important: the "temporal proximity of the arrest and the confession," the "presence of intervening circumstances," and, particularly, "the purpose and flagrancy of the official misconduct." 422 U. S. at 603-604.

(p. 25)

In the instant case, the "temporal proximity" of the initial illegality (the interrogation of Petitioner in violation of his right to counsel) to Petitioner's first incriminating statement and the discovery of the body was closer than that of the arrest, first statement, and second statement in *Brown*. Moreover, in *Brewer*, the United States Supreme Court repeatedly commented on the flagrancy of the violation of Petitioner's rights, and on the fact that it was Detective Leaming's very purpose to uncover evidence relating to the victim before Petitioner could consult with his attorney. *Brewer v. Williams, supra*, 430 U. S. at 399, 406, 407-08, 412. At the same time, while in *Brown* the police at least gave *Miranda* warnings between the arrest and Brown's confessions, in this case there were *no* intervening circumstances between the primary illegality and the discovery of the victim's body to dissipate the taint of the violation of Petitioner's right to counsel.

While the preceding analysis is sufficient to demonstrate that the Iowa Supreme Court's use of the "inevitable discovery" doctrine was constitutionally invalid, that use was especially egregious in the instant case because the initial illegalities from which the challenged evidence was derived were violations of the Fifth and Sixth Amendments, not of the Fourth Amendment.

• • •

STATE'S DISTRICT COURT BRIEF
(pp. 16, 21, 24, 25)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil Action File No. 80-450-D

ROBERT ANTHONY WILLIAMS,
Plaintiff,

vs.

DAVID SCURR, Warden; and the
ATTORNEY GENERAL OF THE STATE OF IOWA,
Defendant.

B R I E F

• • •

(p. 6)

II. THE APPLICATION OF THE "INEVITABLE DISCOVERY RULE" BY THE IOWA COURTS WAS IN ACCORD WITH THE CONSTITUTION AND DOES NOT ENTITLE PETITIONER TO HABEAS CORPUS RELIEF.

A.

At Petitioner's trial evidence about the condition of the victim's body and evidence from the body was offered against Petitioner. This evidence had been ruled erroneously admitted in an earlier trial because it had been discovered as a result of statements obtained from Petitioner in violation of his 6th Amendment right to counsel. *Williams v. Brewer*, 375 F. Supp. 170 (S. D. Iowa 1974), *aff'd*, 509 F. 2d 227 (8th Cir. 1974) affirmed on certiorari *Brewer v. Williams*, 430 U. S. 387 (1977).

The admission at retrial was based on the fact that "the body would have been found in any event . . ." as suggested by the United States Supreme Court. *Brewer v. Williams*, *supra*, 430 U. S. at 407 n.12. In the footnote the Supreme Court cites with approval *Killough v. United States*, 336 F. 2d 929 (D. C. Cir. 1964).

. . .

(p. 7)

The suggestion of the application of the "inevitable discovery rule", and the citation to *Killough*, *supra*, with its language as quoted above, by the United States Supreme Court, clearly indicates that the application of that rule by the Iowa Supreme Court, on facts even more positive toward discovery was constitutional and proper.

. . .

(p. 10)

This Court should not reject the rule. It was, as indicated by the Iowa Supreme Court and the cases cited, accepted by most jurisdictions prior to the United States Supreme Court recommendation. The apparent imprima-

tur of the United States Supreme Court in *Williams v. Brewer, supra*, militates rejection absent further rejection by that Court.

In *United States v. Ceccolini*, 435 U.S. 268 (1978) the Court implicitly approved the rationale for the rule. The Court there upheld the use of a witness who had been identified in violation of the defendant's 4th Amendment rights.

"The greater the willingness of the witness to freely testify, *the greater the likelihood that he or she will be discovered by legal means*, and concomitantly, the smaller the incentive to conduct an illegal search to discover the witness. (fn. omitted) *Witnesses are not like guns or documents which remain hidden from view until one turns over a safe or opens a filing cabinet*. Witnesses can, and often do, come forward and offer evidence entirely of their own volition. *And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live witness testimony than other kinds of evidence.*" (emphasis added)

435 U.S. at 276-277. In the case of inevitable discovery, the evidence would "be discovered by legal means." The degree of certainty of discovery is the test of what it takes to "dissipate the taint." Thus if discovery is certain, and there is no bad faith, *See Ceccolini, supra*, 435 U.S. at 276 fn. 4 (omitted in quote above) there is no reason to exclude the evidence.

The application by the Iowa Court in the context of the instant case also was clearly proper. The Iowa Court

(p. 11)

held that the State had to establish by a preponderance of the evidence, 285 N.W. 2d at 260, that the evidence

"would have discovered" not that "discovery might have occurred." This is the equivalent of "actualities, not possibilities" suggested in *Hoffman, supra*, 607 F. 2d at 285 n.3. In *Brookins*, the Court stated:

"After the accused has challenged the legality of the witness' acquisition and of the use of the witness' testimony, the police must show that when the illegality occurred they possessed and were actively pursuing the evidence or leads that would have led to the discovery of the challenged witness and that there was a reasonable probability that the witness would have been discovered.

Brookins, supra, 614 F. 2d at 1048. The Iowa Court held that the police had to establish two things: that the police acted in good faith *and* that the evidence would have been discovered by legal means. This clearly meets the necessary burden for admission of the evidence. *United States v. Falley*, 489 F. 2d 33 (2d Cir. 1973); *Alderman v. United States*, 394 U.S. 165 (1969); *United States v. Massey*, 437 F. Supp. 843, 855, text and note 4 (M. D. Florida 1977).

The question then is; was there sufficient evidence upon which the Iowa court could find that the two conditions were met. The Iowa Supreme Court, on the question of whether there was bad faith stated:

"In light of the legitimate disagreement among individual's well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith."

(p. 12)

State v. Williams, supra, 285 N.W. 2d at 261. This is based on the fact that the Iowa Supreme Court originally upheld the actions of the police and affirmed the convic-

tion by a five to four decision, *State v. Williams*, 182 N. W. 2d 396 (Iowa 1970), the United States District Court then granted habeas corpus relief *Williams v. Brewer*, 375 F. Supp. 170 S. D. Iowa 1974, which was affirmed by a split vote of a panel of the 8th Circuit Court of Appeals, *Williams v. Brewer*, 509 F. 2d 227 (8th Cir. 1974). This was then affirmed five to four by the United States Supreme Court with six justices writing separately. The Iowa Court was correct in finding no bad faith.

• • •

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1140

ROBERT ANTHONY WILLIAMS,

Appellant,

vs.

CRISPUS NIX, Warden of the Iowa State
Penitentiary,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF IOWA,
CENTRAL DIVISION

Honorable Harold D. Vietor, Judge

BRIEF OF APPELLANT

ROBERT BARTELS

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Attorney for Appellant

• • •

(p. 17)

II. THE STATE TRIAL COURT'S ADMISSION OF EVIDENCE RELATING TO THE VICTIM'S BODY VIOLATED PETITIONERS' RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

• • •

A. The "Inevitable Discovery" Test Applied by the State Courts was Constitutionally Impermissible.

The District Court agreed with the Iowa courts that the victim's body and evidence derived from it were admissible under the "inevitable discovery"

(p. 18)

doctrine at Petitioner's trial. (Opinion p. 8). This doctrine, as articulated by the Iowa Supreme Court and approved by the District Court, involves a two-part test under which the state must show (1) that the police did not act in "bad faith," and (2) that the evidence probably would have been discovered without the initial unlawful conduct. 285 N. W. 2d at 262. As the District Court acknowledged, neither the United States Supreme Court nor this Court has adopted this hypothetical "inevitable discovery" doctrine. (Opinion p. 6). Because this proposed exception to the exclusionary rule is wholly inconsistent with decisions of the United States Supreme Court concerning the Fifth and Sixth Amendment and the "fruit of the poisonous tree" doctrine, this Court should reject the "inevitable discovery" doctrine in this case.

• • •

(p. 20)

Application of the constitutionally appropriate fruit-of-the-poisonous-tree standards to the instant case shows that the victim's body and the evidence derived therefrom should have been excluded from the trial: It simply can-

not be disputed that the body and the evidence connected with it in fact *were* discovered because Petitioner led police to the body following the unconstitutional interrogation.

In this regard, *Brown v. Illinois*, 422 U.S. 590 (1975), is especially instructive. In *Brown*, the defendant was arrested, without probable cause, at about 7:45 p.m. Following repeated *Miranda* warnings, he gave two incriminating statements, first at about 9:00 p.m., and then between 2:00 and 3:00 a.m. the following day. The Court reversed Brown's conviction, holding that both

(p. 21)

statements were fruits of the illegal arrest, and that the *Miranda* warnings did not sufficiently attenuate the taint. 422 U.S. at 604-605. The Court stated that in determining whether the "casual connection between the illegality and the confession" had been broken "for Fourth Amendment purposes," the *Miranda* warnings were important but not dispositive, and that at least three other factors were important: the "temporal proximity of the arrest and the confession," the "presence of intervening circumstances," and, particularly, "the purpose and flagrancy of the official misconduct." 422 U.S. at 603-604.

In the instant case, the "temporal proximity" of the initial illegality (the interrogation of Petitioner in violation of his right to counsel) to Petitioner's first incriminating statement and the discovery of the body was closer than that of the arrest, first statement, and the second statement in *Brown*. Moreover, in *Brewer*, the United States Supreme Court repeatedly commented on the flagrancy of the violation of Petitioner's rights, and on the fact that it was Detective Leaming's very purpose to uncover evidence relating to the victim before Petitioner

could consult with his attorney. *Brewer v. Williams, supra*, 430 U.S. at 399, 406, 407-08, 412. At the same time, in the instant case there were *no* intervening circumstances between the primary illegality and the discovery of the victim's body to dissipate the taint of the violation of Petitioner's right to counsel.

. . .

(p. 24)

- C. The Evidence Does not Show that the Victim's Body Would Have Been Found if Petitioner had not Led the Police to it.

As Sections A and B, *supra*, demonstrate, the hypothetical "inevitable discovery" doctrine applied by the Iowa Supreme Court was unconstitutional. Even if the doctrine were constitutional, however, the record shows that it was erroneously applied to the facts of this case.

First, the Iowa Supreme Court erred in concluding that law enforcement officials acted in "good faith"—the first requirement of that Court's own test. In *Brewer v. Williams*, 430 U.S. 357 (1977), the Court specifically found that Detective Leaming purposefully violated Petitioner's Sixth/Fourteenth Amendment rights in order to obtain incriminating information from him before he could consult with his attorney. 430 U.S. at 399, 406, 407-408, 412. Surely this kind of purposeful conduct cannot be regarded as being in "good faith."¹⁵

¹⁵ In this regard, the fact that the constitutionality of Detective Leaming's conduct "has caused the closest possible division of views in every appellate court which has considered the question," 285 N.W. 2d at 260-61, is irrelevant. The only decision that has the force of law is that of the majority of the Supreme Court in *Brewer v. Williams, supra*.

. . .

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1140

ROBERT ANTHONY WILLIAMS,

Appellant,

vs.

CRISPUS NIX, Warden of the Iowa State
Penitentiary,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF IOWA,
CENTRAL DIVISION

Honorable Harold D. Vietor, Judge

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(p. 16)

• • •

II. THE APPLICATION OF THE "INEVITABLE
DISCOVERY RULE" BY THE IOWA COURTS WAS
IN ACCORD WITH THE CONSTITUTION AND DOES
NOT ENTITLE PETITIONER TO HABEAS CORPUS
RELIEF.

• • •

(p. 20)

In *United States v. Ceccolini*, 435 U. S. 268 (1978) the
Court implicitly approved the rationale for the rule. The

Court there upheld the use of a witness who had been identified in violation of the defendant's 4th Amendment rights.

"The greater the willingness of the witness to freely testify, *the greater the likelihood that he or she will be discovered by legal means*, and concomitantly, the smaller the incentive to conduct an illegal search to discover the witness. (fn. omitted) *Witnesses* are not like guns or documents which remain hidden from view until one turns over a safe or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live witness testimony than other kinds of evidence." (Emphasis added)

(p. 21)

435 U.S. at 276-277. In the case of inevitable discovery, the evidence would "be discovered by legal means." The degree of certainty of discovery is the test of what it takes to "dissipate the taint." Thus if discovery is certain, and there is no bad faith, *See Ceccolini, supra*, 435 U.S. at 276 fn. 4 (omitted in quote above) there is no reason to exclude the evidence.

. . .

(p. 22)

The Iowa Court held that the police had to establish two things: that the police acted in good faith *and* that the evidence would have been discovered by legal means. This clearly meets the necessary burden for admission of the evidence. *United States v. Falley*, 489 F. 2d 33 (2d Cir. 1973); *Alderman v. United States*, 394 U.S. 165 (1969); *United States v. Massey*, 437 F. Supp. 843, 855, text and note 4 (M.D. Florida 1977).

The question then is; was there sufficient evidence upon which the Iowa court could find that the two conditions were met. The Iowa Supreme Court, on the question of whether there was bad faith stated:

"In light of the legitimate disagreement among individuals' well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith."

State v. Williams, supra, 285 N. W. 2d at 261. See *State v. Williams*, 182 N. W. 2d 396 (Iowa 1970), (5-4 decision); *Williams v. Brewer*, 375 F. Supp. 170 (S. D. Iowa 1974), *Williams v. Brewer*, 509 F. 2d 227 (8th Cir. 1974), (2-1 decision), *Brewer v. Williams*, 430 U. S. 387 (1977) (5-4 decision). In addition, the facts show a search was continuing and in progress when the statements leading to the evidence were obtained. The Iowa Supreme Court was correct in finding no bad faith.

. . .

NO. 82-1651

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

CRISPUS NIX, Warden of the Iowa
State Penitentiary,
Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in deciding an issue which was raised and argued in the District Court and the Court of Appeals, and which the State agreed the Court of Appeals should decide.

2. Whether the Court of Appeals, in determining whether evidence that was obtained as the direct result of violations of the Sixth Amendment nevertheless was constitutionally admissible at trial, properly considered the lack of good faith of the law enforcement officer who committed those violations.

3. Whether the Court of Appeals properly concluded that the state had not shown that a police officer had acted in good faith when the officer interrogated a defendant in the absence of counsel, in violation of an agreement with the defendant's attorney, and in an admittedly intentional and purposeful attempt to obtain as much incriminating information as possible before the defendant could reach his attorney.

4. Whether this Court should consider the validity and proper scope of the so-called "inevitable discovery" doctrine in a case in which the application of that doctrine, even in its broadest form, would still uphold the result reached by the Court of Appeals.

5. Whether this Court should consider extending the holding in Stone v. Powell to Sixth Amendment violations in a case in which the defendant in any event did not receive a full and fair opportunity to litigate his claims in the state courts.

6. Whether this Court should extend the holding in Stone v. Powell to bad faith Sixth Amendment violations.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

CRISPUS NIX, Warden of the Iowa
State Penitentiary,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

Since the filing of the Petition, the opinion of the Court of Appeals has been reported at 700 F.2d 1164.

STATEMENT OF THE CASE

Since most of the underlying facts in this case are recounted in this Court's opinions in Brewer v. Williams, 430 U.S. 387 (1977), they require only brief attention here. On December 24, 1968, ten year-old Pamela Powers disappeared from the Des Moines, Iowa, YMCA. Suspicion focused on Respondent Williams, and a warrant for his arrest on a charge of "child-stealing" was filed in state court. On December 26, acting on the advice of his attorney, Henry T. McKnight, Williams surrendered to the police in Davenport, Iowa, where he was arraigned on the warrant. Later on the

same day, Detective Cletus Leaming and another Des Moines police officer drove to Davenport to pick up Williams and return him to Des Moines. 430 U.S. at 390-391.

Before leaving Des Moines, Leaming agreed with Williams' attorney that Williams would not be questioned on the return trip. Nevertheless, during the trip from Davenport to Des Moines, Leaming initiated a conversation with Williams that Leaming later conceded was purposefully designed to elicit as much incriminating information as possible from Williams before he could reach his attorney. Leaming's efforts included an appeal to Williams' religious sympathies and statements that he and Williams should stop on the way to Des Moines and locate the body of the victim. Williams complied with these suggestions, and led Leaming and other police officers to the body. 430 U.S. at 391-393.

At Williams' first trial, the State introduced into evidence Williams' statements to Leaming. The resulting conviction was affirmed by the Iowa Supreme Court. State v. Williams, 182 N.W. 2d 396 (1970). However, in a habeas corpus proceeding, the United States District Court for the Southern District of Iowa reversed the conviction, holding that Leaming had violated Williams' Fifth and Sixth Amendment rights. Williams v. Brewer, 375 F. Supp. 170 (S.D. Iowa 1974). Both the Eighth Circuit Court of Appeals, Williams v. Brewer, 509 F.2d 227 (1975), and this Court, Brewer v. Williams, supra, affirmed the District Court's reversal.¹

At Williams' retrial, the State sought to introduce evidence derived from the victim's body under a so-called "inevitable discovery" exception to the exclusionary rule. The trial court upheld this effort, finding that the body probably would have been found by searchers even if Leaming had not violated Williams' con-

¹ This Court's holding reached only the Sixth Amendment violation. 430 U.S. at 397-98.

stitutional rights. Williams' subsequent conviction was upheld by the Iowa Supreme Court. State v. Williams, 285 N.W. 2d 248 (1979). That court articulated a two-pronged inevitable-discovery doctrine under which the State was required to show (1) that the challenged evidence probably would have been discovered in the absence of the underlying constitutional violation, and (2) that the constitutional violation was committed in good faith. It then held that the State had satisfied both prongs. 285 N.W. 2d at 260.

Williams again sought habeas corpus relief in the District Court on a number of grounds, including a multi-level challenge to the Iowa Supreme Court's application of the "inevitable discovery" doctrine. The District Court denied the petition. Williams v. Nix, S.D. Iowa No. 80-450-D, Dec. 18, 1981 (Pet. at A68). However, on appeal the Eighth Circuit Court of Appeals reversed the judgment of the District Court. Williams v. Nix, 700 F.2d 1164 (1983) (Pet. at A1). The Court of Appeals confined its opinion to a single issue: inevitable discovery. Although it declined to decide "whether to recognize the inevitable-discovery or hypothetical-independent-source exception to the rule excluding evidence obtained in violation of the Sixth Amendment right to counsel," the Court of Appeals did hold that "if there is to be an inevitable-discovery exception the State should not receive its benefit without proving that the police did not act in bad faith." 700 F.2d at 1169 (Pet. at A93-A10). The Court of Appeals then held that the State had failed to show lack of bad faith. 700 F.2d at 1171-1173 (Pet. at A10-A17).

SUMMARY OF ARGUMENT

1. Contrary to the State's assertions, it had ample notice of the "good faith" issue on which the Court of Appeals decided this case: The Iowa Supreme Court announced good faith as an element of its hypothetical inevitable discovery doctrine; Williams and the State raised and argued Leaming's good faith both in the District Court and in the Court of Appeals; and the State specifically argued that the Court of Appeals should decide the good faith issue.

2. The decision of the Court of Appeals was correct under Brown v. Illinois, 422 U.S. 590 (1975), and Dunaway v. New York, 442 U.S. 200 (1979). Williams led Leaming to the body soon after the violation of his rights; there were no intervening circumstances; and Leaming's intentional elicitation of incriminating information before Williams could consult with his attorney -- in violation of Leaming's agreement with that attorney -- was flagrantly unconstitutional.

3. This Court need not consider or decide the validity of any inevitable-discovery doctrine in the context of this case, since the Court of Appeals was correct in holding (a) that any valid inevitable-discovery doctrine must include a good faith element and (b) that good faith was not established. Good faith is a particularly important issue under the "attenuation" exception to the exclusionary rule under Brown v. Illinois and Dunaway v. New York, supra, and there is no reason why^a it should be any less an issue under any inevitable-discovery exception. Moreover, permitting the introduction of evidence derived from bad faith violations of the Sixth Amendment would remove the incentive for the police to use legal means to obtain such evidence, and would impugn the integrity of the judicial process.

4. The Court of Appeals was correct in concluding that Leaming did not act in good faith. This Court's decision in Brewer v. Williams, 430 U.S. 387 (1977), established that Leaming intentionally and purposefully sought to elicit incriminating information from Williams before he could reach his attorney, and that this was in violation of an agreement with that attorney. Especially in light of Massiah v. United States, 377 U.S. 201 (1963), Leaming could not have believed, reasonably or otherwise, that this conduct did not violate Williams' Sixth Amendment rights. Consequently, Leaming's good faith was established under a "subjective" or an "objective" standard.

5. A grant of certiorari in this case also would be inappropriate because even if an inevitable-discovery doctrine without a good faith element were valid, the result reached by the Court of Appeals would stand. Additional evidence introduced in the District Court established (a) that the search for the victim's body that was initiated two days after her disappearance would not have extended into Polk County, where the body was located, and (b) that even if the search had extended into Polk County, searchers would not have been able to see the body. Thus, even application of the broadest possible inevitable-discovery doctrine would affirm the judgment of the Court of Appeals.

6. This is not an appropriate case for this Court to consider an extension of Stone v. Powell, 428 U.S. 465 (1976), beyond the Fourth Amendment context. The holding and rationale of Stone were carefully limited to the judicially-created exclusionary rule for Fourth Amendment violations. See also Rose v. Mitchell, 443 U.S. 545 (1978). Unlike the claimed Fourth Amendment violations in Stone, the Sixth Amendment violations in this case involved personal rights, and directly affected the integrity of the judicial process. Moreover, extension of Stone would be especially inappropriate in this case because the con-

stitutional violations were not committed in good faith. Finally, application of Stone to this case would not change the result in any event, since Williams did not have a full and fair opportunity to litigate his claims in the state courts.

REASONS FOR DENYING THE WRIT

I. THE STATE HAD AMPLE NOTICE OF, AND LITIGATED, THE "GOOD FAITH" ISSUE IN THE DISTRICT COURT AND COURT OF APPEALS.

As noted previously, the Court of Appeals did not reach the question of whether the "inevitable discovery" doctrine applied by the Iowa Supreme Court was constitutionally valid. However, the Court of Appeals did hold that if an inevitable-discovery doctrine was to be recognized, it must include a "good faith" element, and that the State had failed to show that Detective Leaming acted in good faith when he committed the violations of Williams' constitutional rights that led to the discovery of the evidence in question.

The State's first, and lengthiest, complaint about the decision below is that the State had no "real notice" of the "good faith" issue on which the Court of Appeals based its holding, and that that issue should have been remanded to the District Court for a "limited evidentiary hearing" (Pet. at 8-9). This complaint is totally without merit because the State in fact had ample notice of the "good faith" issue -- and argued it on the merits -- throughout the proceedings in the District Court and the Court of Appeals:

1. Prior to the filing of the petition for a writ of habeas corpus in the District Court, the Iowa Supreme Court identified "good faith" as a critical element in the hypothetical inevitable-discovery doctrine it applied. 285 N.W. 2d at 260.

2. The initial memorandum that was filed in the District Court in support of the petition for a writ of habeas corpus

raised the lack-of-bad faith element of the Iowa Supreme Court's hypothetical inevitable discovery test. (Memorandum filed Mar. 30, 1981, p. 21). Moreover, in urging that this Court's decision in Brown v. Illinois, 422 U.S. 590 (1975), required reversal of the Iowa Supreme Court's inevitable-discovery decision, Williams argued in the District Court that Detective Leaming's conduct was a flagrant violation of his rights. (Id. at 25). Since "flagrancy" is simply the opposite of "good faith," Dunaway v. New York, 442 U.S. 200, 221, 226 (1979), State v. Williams, 285 N.W. 2d 248, 259 (Ia. 1979), this argument certainly gave notice that Detective Leaming's lack of good faith was an issue.

3. The State explicitly dealt with the "good faith" issue, in its initial brief in the District Court, arguing that Detective Leaming did act in "good faith." (Brief filed April 1, 1981, pp. 11-12).

4. The District Court not only recognized the "good faith" element, but also upheld the inevitable-discovery test articulated by the Iowa Supreme Court in part "because the test requires an absence of bad faith on the part of the police" (Pet. at A77).

5. Although Williams' opening brief in the Court of Appeals argued that Detective Leaming did not act in good faith (Appellant's Brief at 24), the State at no time complained that it had not received notice of that issue in the District Court. Instead, the State's Brief in the Court of Appeals directly addressed the "good faith" issue on its merits (Appellee's Brief at 22). Moreover, at oral argument counsel for the State explicitly and repeatedly took the position that the State should have the burden of establishing good faith, and that the State had done so. 700 F.2d at 1169, n.5; 1174-1175 (Pet. at A10, n.5; A24-A26).

Given the facts outlined above, the State's reliance on Justice Powell's concurring opinion in Brewer v. Williams, 430 U.S. 387, 414, n.3 (1977) (Pet. at 8-9), is totally misplaced. In

Brewer, Justice Powell declined to consider the applicability of Stone v. Powell, 428 U.S. 465 (1977), because it had never been mentioned in any of the briefs, even though the State's Reply Brief had been filed after Stone was decided. In the instant case, by contrast, the "good faith" issue had been raised in the District Court and was briefed by both parties in the Court of Appeals prior to oral argument.²

In sum, the State had ample notice that Detective Leaming's good faith was an issue, and consistently pursued the strategy in the District Court and Court of Appeals of arguing that good faith was established on the record before those courts. Consequently, the State's argument for a remand for a "limited evidentiary hearing" is without merit.

II. THE DECISION OF THE COURT OF APPEALS WAS CORRECT UNDER PRIOR DECISIONS OF THIS COURT.

This Court also should deny the petition for a writ of certiorari because the decision of the Court of Appeals -- viz., that the evidence at issue should have been excluded because it was obtained as the direct result of acts by a state law enforcement officer that (a) violated the Sixth Amendment and (b) were not committed in "good faith" -- plainly was correct under Brown v. Illinois, 422 U.S. 590 (1975), and Dunaway v. New York, 442 U.S. 200 (1979).

In Brown, the defendant was arrested, without probable cause, at about 7:45 p.m. Following repeated Miranda warnings, he gave two incriminating statements, first at about 9:00 p.m., and then between 2:00 and 3:00 a.m. the following day. This Court reversed Brown's conviction, holding that both statements were fruits of the illegal arrest, and that neither the Miranda warnings nor any other factors sufficiently attenuated the taint of

² For similar reasons, the State's references to Jackson v. Denno, 378 U.S. 478 (1964), and United States v. Wade, 388 U.S. 218 (1967) (Pet. at 10-11) also are misplaced.

the illegality. 422 U.S. at 604-605.

In Dunaway, the defendant was taken into custody without probable cause and interrogated after he was given Miranda warnings. The defendant waived counsel and eventually made statements that incriminated him. Holding that Dunaway was "virtually a replica of" Brown, this Court held that the defendant's statements were illegal fruits of the unconstitutional seizure of the defendant, and that neither the fact that the police had complied with Miranda nor the fact that the defendant's statements were voluntary attenuated the taint of the initial illegality. 442 U.S. at 218-219.

In both Brown and Dunaway, this Court's focus was on the actual causal connection between the initial constitutional violations and the evidence derived therefrom. This Court specifically eschewed any simple "but for" causal test; rather, the question was whether the challenged evidence was obtained through exploitation of the primary illegality. In determining that question, three factors were to be considered: (1) the "temporal proximity" of the illegality and the evidence; (2) "the presence of intervening circumstances"; and (3) "particularly, the purpose and flagrancy of the official misconduct" This Court noted specifically that "the burden of showing admissibility rests, of course, on the prosecution." 422 U.S. at 603-604; 442 U.S. at 218.

An examination of these factors in the instant case leaves no doubt as to the correctness of the result reached by the Court of Appeals. First, the "temporal proximity" of the unconstitutional statements and the discovery of the body was as close as that in Brown and Dunaway. Second, there were no intervening circumstances between the violation of Williams' constitutional rights and the discovery of the body. Third, the official misconduct in the instant case was especially flagrant. As this Court held in Brewer v. Williams, 430 U.S. 387 (1977), Leaming had agreed with Williams'

retained counsel, Mr. McKnight, that he would not interrogate Williams on the return trip from Davenport to Des Moines. Nevertheless, Leaming embarked on a course of conduct which he admitted was purposefully designed to elicit as much incriminating information as possible from Williams before he could reach McKnight. 430 U.S. at 391, 399. In both Brown and Dunaway, this Court held that the initial official misconduct was flagrant because "the arrest without probable cause had a 'quality of purposefulness' in that it was an 'expedition for evidence' admittedly undertaken 'in the hope that something might turn up.'" Dunaway v. New York, supra, 442 U.S. at 218, quoting from Brown v. Illinois, supra, 442 U.S. at 605. Similarly in the instant case, Leaming's unconstitutional conduct was a purposeful expedition for evidence admittedly undertaken in the hope that something incriminating would turn up.

"Flagrancy" is of course simply the opposite side of the coin of "good faith." Dunaway v. New York, supra, 442 U.S. at 221, 226. Consistently with the above analysis, the Court of Appeals persuasively demonstrated that Leaming did not act in "good faith." 700 F.2d at 1170-1173 (Pet. at A11-A17). Given Leaming's agreement with Williams' attorney, the fact that judicial proceedings had been initiated through Williams' arraignment on an arrest warrant, and the prior existence of Massiah v. United States, 377 U.S. 201 (1964), it cannot reasonably be said that Leaming acted in "good faith" when he purposefully set out to elicit incriminating information from Williams before he could get to his attorney. (See Division IV, infra).

III. THE COURT OF APPEALS' CONCLUSION THAT ANY VALID "INEVITABLE DISCOVERY" DOCTRINE MUST INCLUDE A "GOOD FAITH" ELEMENT WAS CORRECT, AND DID NOT CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

This Court has not decided the validity of any "inevitable discovery" exception to the exclusionary rule in the Fourth, Fifth, or Sixth Amendment context. United States v. Crews, 445 U.S. 463, 475, n.22 (1980). However, this Court's decisions regarding the evidentiary "fruits" of constitutional violations strongly suggest the impropriety of such an exception, since those decisions uniformly have determined the admissibility of challenged evidence on the basis of whether the evidence "has been come at by exploitation of [illegal conduct] or instead by means sufficiently distinguishable to be purged of the primary taint," Wong Sun v. United States, 371 U.S. 471, 488 (1964) (emphasis added) -- not on the basis of whether the evidence hypothetically would have been discovered if the primary illegality had not occurred. See also Division II, supra; United States v. Wade, 388 U.S. 218, 240 (1967).³

In any event, this Court need not, and should not, reach the issue of the validity of an inevitable-discovery doctrine in this case. Even assuming, as the Court of Appeals did, that some inevitable-discovery doctrine is constitutionally valid, the evidence in question here was inadmissible because Leaming did not act in good faith when he purposefully violated Williams' constitutional rights.

³ Recognition of any hypothetical inevitable discovery doctrine would seriously emasculate the purposes of the exclusionary rule. Under that doctrine, even if the police were able to obtain evidence by legal means, there would be little incentive for them to use such means, rather than more "convenient" illegal means, since the evidence would be admissible in any event. Application of the hypothetical inevitable-discovery doctrine also would involve a highly subjective and ambiguous "factual" inquiry, and hence a high potential for abuse.

In this regard, the State's petition for certiorari complains that the Court of Appeals erred in including a "good faith" element in the inevitable-discovery doctrine that it assumed to be valid. Given this Court's prior decisions, however, this complaint has no merit. In applying the "attenuation" doctrine to determine whether the "but-for" fruits of unconstitutional conduct may be admitted into evidence, this Court has made it clear that the flagrancy of the primary illegality is a "particularly" important factor. Brown v. Illinois, *supra*, 422 U.S. at 603-604; Dunaway v. New York, *supra*, 442 U.S. at 218. As noted previously, flagrancy is simply the opposite side of the coin of good faith. *Id.* at 221, 226. If an inevitable-discovery exception to the exclusionary rule is to be recognized at all, there simply is no less reason to consider good faith under that exception than under the "attenuation" doctrine.

Indeed, since the emasculating effects on the purposes of the exclusionary rule of the hypothetical inevitable discovery doctrine are potentially more far-reaching than those of the attenuation doctrine, there is more reason to include a "good faith" element in the former than in the latter. If the fruits of even bad faith violations of constitutional rights were made admissible simply upon a showing that the evidence more likely than not would have been discovered anyway, there would be little disincentive to the intentional use of unconstitutional means to gather evidence, rather than less convenient constitutional means.

The preceding analysis applies with special force when the primary illegality is a violation of the Sixth Amendment, rather than the Fourth Amendment. Since Sixth Amendment violations necessarily occur after the initiation of formal judicial proceedings, Kirby v. Illinois, 406 U.S. 682 (1972), bad faith police conduct in the Sixth Amendment context directly affects the integrity of the judicial process. *Cf.* Stone v. Powell, 428 U.S. 465, 479 (1977); *see* Division VI, *infra*.

With regard to the good faith issue, nothing in the Court of Appeals' decision is inconsistent with the circuit court decisions cited by the State (Pet. at 11-12). The most obvious reason why this is so is that in none of those cases -- Killough v. United States, 336 F.2d 929 (D.C. Cir. 1964), United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980), United States v. Schmidt, 573 F.2d 1057 (1978), and Government of the Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974) -- was any question raised as to the good faith of the law enforcement officers (or as to the relevance of good faith).⁴ That the failure of a court to discuss "good faith" in a particular case does not imply that it is not a proper element of an inevitable discovery-type inquiry is illustrated by the Second Circuit's decision in United States v. Alvarez-Porras, 643 F.2d 54 (1981). In Alvarez-Porras, one defendant argued that certain evidence seized from his apartment should have been suppressed as fruits of an illegal search. The court rejected this argument -- even though it found that an illegal warrantless search "led immediately to the seizure of the bulk of the incriminating evidence"-- because the police believed that a warrant had been signed, temporarily discontinued their search when they discovered they were mistaken, and then continued the search only

⁴ Although the lack of any "good faith" issue in the cases cited by the State is sufficient to dispose of them for purposes of the pending petition for certiorari, it may be useful to note that they are distinguishable for other reasons as well. First, in Killough, the court was careful to point out that the "evidence" at issue in no way connected the defendant to the crime; the same cannot be said in the instant case. Second, in Brookins, the court's references to the inevitable discovery doctrine were pure dictum; moreover, Brookins involved the discovery of a witness, rather than physical evidence -- a distinction which this Court emphasized in United States v. Ceccolini, 435 U.S. 268, 276-77 (1978). Third, in Schmidt, the inevitable discovery doctrine was discussed purely by way of dictum in a footnote -- and the Ninth Circuit subsequently has made it clear that Schmidt did not indicate that that court had adopted the doctrine. United States v. Hoffman, 607 F.2d 280, 285 (9th Cir. 1979). Fourth, in Gereau, the court required the government to show that the challenged evidence was not found as a result of the primary illegality by clear and convincing evidence, 502 F.2d at 927 -- a far more stringent standard than that used by the Iowa Supreme Court and advocated by the State.

after a signed warrant actually arrived. In so holding, the court emphasized the good faith of the police officers, 643 F.2d at 65, even though previous Second Circuit decisions had not mentioned this as a factor, see 643 F.2d at 61-62.⁵

In connection with the "good faith" issue, the State specifically complains that "there is no clear authority for the proposition that the inquiry is subjective in nature[,] as assumed by the panel in this case." (Pet. at 12). However, the issue of whether "good faith" is a subjective or objective inquiry does not provide any basis for the granting of certiorari in this case, for at least two reasons.

First, as Division IV, infra, discusses in some detail, even if the inquiry is purely objective, the record and the logic of the Court of Appeals' opinion demonstrate that the State failed to meet its burden; indeed, if anything the correctness of the Court of Appeals' decision is even more obvious under an objective standard.

Second, this Court's decisions concerning the "good faith" defense to §1983 claims imply that "good faith" should have both an objective and a subjective aspect in the context of the instant case. In Wood v. Strickland, 420 U.S. 308 (1975), this Court held that an official sued under §1983 would not have a valid good faith defense if he

knew or reasonably should have known that the action he took . . . would violate the constitutional rights of the [plaintiff], or if he took the action with malicious intention to cause a deprivation of constitutional rights or other injury


422 U.S. at 321-22 (emphasis added). See also Procunier v.

⁵ In Alvarez-Porras, the Second Circuit explicitly declined to approve any so-called "inevitable discovery" theory, relying instead on "the principles underlying the exclusionary rule," as articulated in Wong Sun v. United States, supra, and on "the narrow showings made at the suppression hearing." 643 F.2d at 63-65. As Division II, supra, demonstrates, the same approach in the instant case leads to the same result reached by the Court of Appeals.

Navarette, 434 U.S. 555, 562-563, 566 (1978). As the State suggests (Pet. at 12), it is true that in Harlow v. Fitzgerald, ____ U.S. ____, 102 S.Ct. 2727 (1982), this Court held that bare allegations of malice would not suffice to overcome a good faith defense in §1983 claims, thereby eliminating the subjective element in such cases. However, the sole rationale for this holding was that the factual question of an official's malicious intention was not ordinarily resolvable on summary judgment, and therefore the subjective element of the good faith defense in §1983 actions as a practical matter exposed officials to undue burdens connected with pre-trial discovery and trial itself. 102 S.Ct. at 2737-2739. Obviously, the rationale of Harlow does not apply to the criminal trial process: Law enforcement officers generally are not subject to pre-trial discovery in criminal cases; and even under a purely objective good faith standard, an evidentiary hearing still would be required (since criminal pre-trial procedures do not include any equivalent to summary judgment).

Given Wood v. Strickland and Procunier v. Navarette, *supra*, the Court of Appeals' use of a subjective good faith standard was proper -- although the Court of Appeals also could have used an objective standard. Any in any event, the "subjective" inquiry of the Court of Appeals -- whether Leaming believed he was violating Williams' Sixth Amendment rights -- did not differ significantly, if at all, from the "objective" inquiry, left intact by Harlow, see 102 S.Ct. at 2737, 2740, of whether the official in question knew that his conduct violated the constitution.

In sum, the Court of Appeals' "good faith" inquiry was correct under this Court's prior decisions. As the following Division will show, the Court of Appeals' answer to this inquiry also was correct, under either an objective or a subjective standard.



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IV. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT
DETECTIVE LEAMING DID NOT ACT IN GOOD FAITH.

Having correctly decided that the State could prevail on an inevitable-discovery theory, if at all, only upon a showing that Leaming acted in good faith when he violated Williams' constitutional rights, the Court of Appeals went on to hold that such a showing had not been made. As the Court of Appeals' careful opinion itself demonstrates, 700 F.2d at 1171-1173 (Pet. at A13-A17), this holding was correct; and this is so regardless of whether good faith is regarded as a "subjective" or "objective" issue.

A. From what the Court of Appeals characterized as a "subjective" point of view, all of the evidence in the record directly contradicts any notion that Leaming acted under an honest belief that he was not violating Williams' rights. Indeed, given the facts already established in this Court's holding in Brewer v. Williams, *supra*, lack of good faith is essentially a foregone conclusion. Like every court that has reviewed this case, this Court found that before he left Des Moines to pick up Williams in Davenport, Leaming made an agreement with Williams' attorney that he would bring Williams straight back to Des Moines without questioning him. 430 U.S. at 391, 410, 415. As soon as Williams was isolated from counsel, however, Leaming broke this agreement by purposefully and intentionally attempting to obtain as much incriminating information as possible -- including the location of the body -- before Williams could reach his attorney. 430 U.S. at 399, 407-408, 411-412.⁶

⁶ As the Court of Appeals noted, 700 F.2d at 1172 (Pet. at A15), the record would not support any attempt to "justify" Leaming's actions on the ground that he was hoping to find the victim alive. That the State does not suggest that it could prove such a reason for Leaming's conduct is hardly surprising, since Leaming insisted at the first trial that Williams' attorney had told him that the victim was dead (*App. to Brewer v. Williams*, *supra*, at 96-97), and told Williams that they should stop and locate "the body" in order to ensure a "Christian burial" (430 U.S. at 393).

Especially given Massiah v. United States, 377 U.S. 201 (1963), which this Court has held to be "constitutionally indistinguishable" from this case, 430 U.S. at 400, it could not reasonably be inferred that Leaming did not realize that intentionally and designedly attempting to elicit evidence from a defendant before he could reach his attorney -- in violation of an agreement with the attorney -- would be unconstitutional. This conclusion is supported by Leaming's false denials that he had made an agreement with McKnight and that he had refused to permit another attorney, Mr. Kelly, to accompany Williams from Davenport to Des Moines. 700 F.2d at 1173 (Pet. at A16-A17).

B. Under an "objective" view of "good faith," the factors discussed in the preceding paragraphs and in the Court of Appeals' opinion lead even more ineluctably to the conclusion that Leaming did not act in good faith. As this Court indicated in Harlow v. Fitzgerald, supra, objective good faith is not established if the relevant state official either knew or reasonably should have known that his conduct would violate the Constitution. The "objective" question of whether Leaming in fact knew that his conduct would violate Williams' Sixth Amendment rights is at least very close to (if not the same as) the "subjective" question which the Court of Appeals asked: whether Leaming believed that his conduct would violate the right to counsel. Clearly, the answer to the former question must be the same as the answer to the latter. Similarly, particularly in light of Massiah v. United States, it is clear that Leaming reasonably should have known that intentionally and designedly eliciting as much incriminating evidence as possible from Williams before he could consult with his attorney, in direct violation of an express agreement with that attorney, would violate the Sixth Amendment.⁷

⁷ The same result also follows from application of this Court's holdings in Brown v. Illinois and Dunaway v. New York, supra. See Division II, supra.

C. As the Court of Appeals noted, 700 F.2d at 1170 (Pet. at A11-A12), the theory espoused by the State (Pet. at 13) and the Iowa Supreme Court (285 N.W. 2d at 260) that Leaming acted in good faith simply because a substantial percentage of the judges and justices who ruled on the validity of the first conviction would not have reversed that conviction is wholly without merit. The fact that judges disagree on the constitutional propriety of police conduct does not make it legally proper or reasonable.⁸ For example, the fact that four Justices of this Court conclude in a dissent that the police acted reasonably in searching a defendant or his effects does not mean that the police did act reasonably for Fourth Amendment purposes. Moreover, the State's judicial-disagreement argument does not speak at all to the subjective aspect of the "good faith" issue on which the Court of Appeals properly focused. (See Division III, *supra*).⁹

D. In sum, whether good faith is an objective or subjective question, the Court of Appeals was correct in concluding that Leaming was not shown to have acted in good faith.

⁸ In addition, the assertions by the State and the Iowa Supreme Court that the courts have been "closely divided" on the propriety of Leaming's conduct (Pet. at 13, 285 N.W. 2d at 260) are misleading. In fact, all of the justices of the Iowa Supreme Court who voted to affirm Respondent's first conviction did so on the basis that Williams had waived his Fifth and Sixth Amendment rights by speaking. 182 N.W. 2d at 405. Similarly, Judge Webster's dissent in the Eighth Circuit review of the first conviction was based on the waiver issue. 509 F.2d at 234-237. Hence, the division of judicial opinion on the question of the propriety of Leaming's conduct -- as opposed to the constitutional effect of Williams' conduct -- was not nearly as close as the Iowa Supreme Court suggested.

⁹ The State's suggestion that it is "not inconceivable" that it could show "good faith" if given another opportunity to do so (Pet. at 10) is totally without merit -- quite apart from the fact that the State has already had such an opportunity (See Division I, *supra*). The State suggests no additional evidence that it might present on the good faith issue, and its arguments based on the record speak only to the issue of whether Leaming violated Williams' Sixth Amendment rights -- an issue which this Court already has decided. 430 U.S. at 397-401.

- V. THE RECORD DOES NOT SHOW THAT THE VICTIM'S BODY WOULD HAVE BEEN FOUND IF RESPONDENT'S CONSTITUTIONAL RIGHTS HAD NOT BEEN VIOLATED.

The preceding paragraphs demonstrate that the Court of Appeals' decision concerning Leaming's lack of good faith was legally and factually correct. Even if this were not the case, however, a grant of certiorari would be inappropriate in this case because even if an inevitable discovery doctrine without a good faith element were applied to the record, the result reached by the Court of Appeals would be upheld.

In concluding that the victim's body, and the evidence connected therewith, probably would have been discovered "in any event," the Iowa Supreme Court found (1) that an organized search for the victim would have extended into Polk County, to the area where the body was found, and (2) that the searchers would have seen the body because it was highly visible. 285 N.W. 2d at 262. Even under a "preponderance of the evidence" standard,¹⁰ however, neither of these conclusions was correct.

A. The Search Would Not Have Extended Into Polk County, Where the Body was Located.

On December 26, 1968, a group of volunteer searchers under the direction of Iowa Bureau of Criminal Investigation (BCI) agents Ruxlow and Mayer searched Poweshiek and Jasper Counties (both located east of Polk County) for the victim's body. They discontinued the search at the Polk County border at 3:00 p.m., before Williams indicated he would take Leaming to the body. At the suppression hearing preceding the second trial, Ruxlow testified that he intended to continue the search into Polk County. However, all of the other evidence in this record directly contradicts this testimony (which Ruxlow gave after being informed by the prosecuting attorney that the issue at the suppression hearing would be whether he would have discovered the body if Williams had not led the police to it. Ruxlow Depo. Tr. at 30):

¹⁰ Under United States v. Wade, 388 U.S. 218 (1967), the proper standard would be "clear and convincing evidence."

1. Both Ruxlow's BCI Report (Ex. 11) and Mayer's BCI Report (Ex. 12) specified that the search was to be conducted in Jasper and Poweshiek Counties; neither report even mentioned Polk County. Moreover, Ruxlow made extensive preparations to search Jasper and Poweshiek Counties, but none to search Polk County.

2. The circumstances of the abandonment of the search also clearly demonstrate that there was never any intent to search in Polk County. At 3:00 p.m. on December 26, the searchers were approaching the Polk/Jasper County border, having already completed the planned search of Poweshiek County. (1977 Suppression Tr. at 59). At that time, Ruxlow and Mayer received a radio message to meet other law enforcement officers at Interstate 80. They did so, leaving no one in charge of the search, and not knowing how long they would be gone. (1977 Suppression Tr. at 51-52, 59; Ruxlow Depo. Tr. at 20). When Ruxlow and Mayer arrived at I-80, Leaming requested that they follow him as he proceeded west; at this time, Ruxlow had no information that Williams would lead the officers to the victim, and he did not know why he was following Leaming or how long he would be doing so. (Ruxlow Depo. Tr. at 25-28). Nevertheless, Ruxlow followed Leaming.

Obviously, if Ruxlow had intended to continue the search into Polk County, it would not have made sense for him to abandon the search to follow Leaming, for no known purpose and for an unknown length of time, when there were still two hours of daylight left and a group of searchers was already organized and available. Especially in light of all the other circumstances, the fact that Ruxlow and Mayer left Grinnell precisely at the time that the search of Jasper County was being concluded is too "neat" a coincidence to be explainable on any other basis than that the intent was to search only Poweshiek and Jasper Counties, and that Ruxlow and Mayer decided to leave Grinnell to follow Leaming at 3:00 p.m. because they knew at that time that the searchers were about to

complete the planned search. Certainly the prosecution did not meet its burden of showing, even by a preponderance of the evidence, that the search would have continued into Polk County.

B. Even if the Search Had Extended Into Polk County, the Searchers Would Not Have Found the Body.

Even if the search had extended into Polk County, the record demonstrates that the searchers would not have found the body, for two main reasons:

1. Even if the searchers had left their vehicles to search on foot, they would not have seen the body, which was completely hidden under a cover of snow and brush. (See District Court Ex. 1). In finding that the body would have been visible to the searchers, the Iowa Supreme Court relied on the only two photographic exhibits then in the record (District Court Exhibits 3 and 5), which the court believed showed the body as it appeared when the police first discovered it with Williams' help:

The State also introduced photographs showing the body as it was actually found. These photographs show that Pamela Powers' body would not have been hidden by the inch of snow which accumulated in the area in the evening of December 28 In addition the left leg of the body was poised midair, where it would not have been readily covered by a subsequent snowfall.

State v. Williams, supra, 285 N.W. 2d at 262 (emphasis added). The court apparently based this belief on Ruxlow's testimony at the suppression hearing that Exhibit 5 showed the body exactly as it was found. (1977 Suppression Tr. at 42).¹¹

However, additional evidence introduced in the District Court established beyond question that Exhibits 3 and 5 did not show the body as it was found, and thus that the Iowa Supreme Court's belief was incorrect:

¹¹ Mr. Ruxlow's suppression testimony refers to State's Exhibits C and D. These were introduced in the District Court as Petitioner's Exhibits 3 and 5.

(a) In the habeas corpus proceeding, Ruxlow conceded that Exhibit 5 was taken after the scene had been altered and snow had been removed. (Ruxlow Depo. Tr. at 17). Quite apart from this concession, Exhibit 1 -- which was not available to the defense in the state court proceedings (Dist. Ct. Tr. at 9-12) -- demonstrated clearly that Exhibit 5 could not possibly show the body as it was found: While Exhibit 5 shows the body almost completely exposed to view, Exhibit 1 shows the body completely covered with a blanket of snow and obscured by brush. (See Appendix, pp. A1, A2, supra).

(b) The record also demonstrates that Exhibit 3, (the second photograph introduced at the 1977 suppression hearing) did not show the body as it was found. After the body was found, a police officer took a single initial photograph of the body as it then appeared. After this first photograph was taken, the body was moved and the scene was altered. (Ex. 13 at 189; 1977 Suppression Tr. at 22-23). Exhibit 1, in which the body is virtually indiscernible, must be the single initial photograph. Thus, all the other photographs were taken after the scene had been disturbed.

2. The preceding paragraphs show that it is unlikely the body would have been discovered even assuming that searchers would have left their vehicles in the area where the body was located. The record shows, however, that this assumption is unwarranted. Ruxlow testified that the searchers generally searched from their vehicles; if they saw a "culvert or any out-building of an abandoned farm," they were supposed to get out of their cars. (1977 Suppression Tr. at 47-48). District Court Exhibits 7, 8 and 9 were photographs taken from the road approaching the culvert where the body was located. Although all of these photographs show the location of the culvert, it is not visible in any of them. The searchers therefore would not have left their cars to search, and would not have found the body even if it had been more

visible than Exhibit 1 shows it was.¹²

VI. THIS IS NOT AN APPROPRIATE CASE FOR THE EXTENSION OF STONE V. POWELL OUTSIDE THE FOURTH AMENDMENT CONTEXT.

The State's final argument for the granting of certiorari is that this case "raises the applicability of the doctrine of Stone v. Powell, 428 U.S. 465 [(1976)], in a non-Fourth Amendment context" (Pet. at 13), and that Stone v. Powell should be extended to preclude litigation of the Sixth Amendment violations at issue in this case (Pet. at 13-16). This argument is without merit, for two independently sufficient reasons: (A) the rationale of Stone v. Powell plainly does not apply to Sixth Amendment violations, especially those committed in bad faith; and (B) even if Stone v. Powell were applied to the instant case, it would not bar federal-court review of Williams' federal constitutional claims on their merits.

A. The Rationale of Stone v. Powell Does Not Apply to This Case.

In Stone v. Powell, *supra*, this Court held that a state prisoner who had been afforded a full and fair opportunity to litigate Fourth Amendment exclusionary-rule claims in the state courts

¹² Since the conclusion that the State did not demonstrate that the body would have been discovered in the absence of the violation of Williams' constitutional rights is contrary to that reached by the Iowa Supreme Court, some brief attention to 28 U.S.C. §2254(d) is appropriate. Normally, state court factual findings are entitled to a presumption of correctness in a federal habeas corpus proceeding. 28 U.S.C. §2254(d); Sumner v. Mata, 449 U.S. 539 (1981). However, this presumption of correctness does not apply when "the material facts were not adequately developed at the state court hearing" or when the petitioner "did not receive a full, fair and adequate hearing in the state court proceeding" 28 U.S.C. §2254(d)(3), (6); Townsend v. Sain, 372 U.S. 293 (1963). Given the additional evidence presented in the District Court, both of these exceptions apply. Most importantly, Exhibit 1 and Ruxlow's new testimony made it clear that the Iowa Supreme Court had relied on false and highly misleading testimony in finding that the body was visible. Moreover, the state courts were not presented with District Court Exhibits 7-9, 11, 12, or 16 -- all of which indicated that the victim's body would not have been found.

could not relitigate those claims in a federal habeas corpus proceeding. This holding was carefully limited to its Fourth Amendment context, and was based on the fact that the primary justification for applying a judicially-created exclusionary rule to Fourth Amendment violations is the general deterrence of future violations of the Fourth Amendment by law enforcement officers. 428 U.S. at 479, 486. The Stone opinion specifically noted the very limited role of the "imperative of judicial integrity" in Fourth Amendment exclusionary rule cases, 428 U.S. at 484-85, and made it clear that in the context of the Fourth Amendment, the exclusionary rule "is not a personal constitutional right" that is calculated to redress injury to any particular defendant in relation to the criminal judicial process. Rather, "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect" 414 U.S. 338, 348 (1974).

Given the primarily deterrent purpose of the Fourth Amendment exclusionary rule, permitting relitigation of Fourth Amendment claims in a federal habeas corpus proceeding after a full and fair opportunity to litigate those claims in state court is not justified because the incremental deterrent effect of doing so, if any, is small. 428 U.S. at 493. As this Court's opinion in Stone v. Powell itself indicated, however, denials of Fifth and Sixth Amendment rights are different in kind from Fourth Amendment violations in that they directly impugn the integrity of the judicial process. 428 U.S. at 479. One serious difficulty with the Stone v. Powell argument presented by the amici curiae in this case is that it relies on assertions that the "alleged [sic] constitutional violation occurred at the time of arrest and prior to indictment and the commencement of trial." (Illinois Amicus Brief at 4, 9). These assertions may be technically accurate; but they ignore the fact that this Court already has held that the Sixth Amendment violations in this case occurred after the com-

mencement of judicial proceedings, 430 U.S. at 398-399 (as Sixth Amendment violations must, see Kirby v. Illinois, 406 U.S. 682 (1972)). Once judicial proceedings have commenced, even at the pretrial stages, the Sixth Amendment right to the assistance of counsel of course "is indispensable to the fair administration of our adversary system of criminal justice." 430 U.S. at 398.

Thus, unlike the Fourth Amendment, the Sixth Amendment does protect "personal constitutional rights," and Sixth Amendment violations directly affect the judicial process in a manner that makes inappropriate the extension of Stone v. Powell to such violations.¹³ This is especially so with regard to bad faith Sixth Amendment violations, which strike with particular force at the integrity of the judicial process.

This conclusion is supported by the post-Stone decisions of this Court and of the Federal circuit courts. In Rose v. Mitchell, 443 U.S. 549 (1979), this Court declined to extend Stone beyond the Fourth Amendment to a claim by state prisoners that their convictions should be overturned because of discrimination in the selection of grand jury foremen -- even though this claim did not implicate the integrity of the fact-finding process by which they had been found guilty. Reaffirming the "limited reach of Stone," 443 U.S. at 560, this Court noted that Rose involved a claimed violation of personal rights, and that the "judicial integrity" concerns and constitutional interests were more compelling than in Stone because the claimed violations struck at "core concerns of the Fourteenth Amendment and at fundamental values of our society and our legal system." 443 U.S. at 563, 564. As noted previously, the instant case similarly involves violations of

¹³ Since the Fifth Amendment explicitly prohibits the use of compelled testimony in criminal proceedings, violations of the Fifth Amendment also directly implicate the integrity of the judicial process. In this connection, it should be noted that the District Court in the first habeas corpus proceeding held that Williams' Fifth Amendment rights were violated, in two respects. 375 F. Supp. at 179-184. This holding has never been reversed.

personal rights that strike at fundamental values of the adversary system.

Consistently with Rose, every federal circuit court faced with the issue has declined to extend Stone v. Powell to Fifth and Sixth Amendment claims. See, e.g., White v. Finkbeiner, 687 F.2d 885 (7th Cir. 1982); Hinman v. McCarthy, 676 F.2d 343, 348-49 (9th Cir.), cert. denied, 103 S.Ct. 468 (1982); Patterson v. Warden, 624 F.2d 69, 70 (9th Cir. 1980); Harryman v. Estelle, 616 F.2d 870, 872 (5th Cir. 1980), cert. denied, 449 U.S. 860 (1981); Morgan v. Hall, 569 F.2d 1161, 1168-69 (1st Cir.), cert. denied, 437 U.S. 910 (1978).

A few final words regarding the applicability of Stone v. Powell to the Sixth Amendment violation in this case are necessitated by the assertion by the amici that Williams' guilt "was not in question" (Illinois Amicus Brief at 9). Quite apart from the fact that nothing in Stone would suggest that the apparent guilt of a defendant by itself would preclude federal habeas corpus review of bad faith Sixth Amendment violations, the suggestion of the amici that Williams' guilt was not questioned simply is not factually correct. Although Williams' guilt may have appeared clear on the record from the first trial, see 430 U.S. at 428, 437, 441, the Court of Appeals specifically noted that at the second trial, Williams' defense -- that someone else killed the victim and placed her body in his room -- was supported by substantial physical and scientific evidence indicating, inter alia, that the perpetrator, unlike Williams, was sterile. 700 F.2d at

1168 (Pet. at A7-A8).¹⁴ Thus, even if the theory that the apparent guilt of a defendant would justify ignoring bad faith Sixth Amendment violations were valid, it would not apply to this case.

B. Even if Stone v. Powell Were Extended to the Instant Case, It Would Not Bar Federal Habeas Corpus Review of the Fifth and Sixth Amendment Claims.

Under Stone v. Powell, federal habeas corpus review of Fourth Amendment claims is barred only if the defendant has had a "full and fair" opportunity to litigate those claims in the state courts. In the instant case, however, Williams did not have such an opportunity, for at least two reasons. First, the state trial judge who heard the motion to suppress indicated to defense counsel that he expected his ruling to be reversed on appeal, apparently because of what he regarded as the less-than-adequate record made by the prosecution. (Dist. Ct. Ex. 17). Certainly it cannot be said that a defendant has had a full and fair hearing on a suppression motion when the judge who heard the matter himself believes he will be reversed. Moreover, as Division V, supra, has discussed in more detail, additional evidence presented in the

¹⁴ In this regard, it also should be noted that additional evidence presented to the District Court with reference to one of the issues not addressed by the Court of Appeals also strongly supported Williams' defense. That evidence consisted of the deposition testimony of Richard Boucher, who was a resident of the Des Moines YMCA on the day of the crime. At about the time of the crime, Mr. Boucher heard suspicious, belligerent noises from the room next to his; he recognized the voice of Albert Bowers, a maintenance man who was responsible for cleaning rest-rooms and residence rooms at the YMCA. Mr. Boucher later saw Bowers taking suitcases into his room, and then heard sounds of packing. When Mr. Boucher and a police officer went to Bowers' room to ask him not to leave, Bowers indicated he was not going anywhere. However, his bags were hidden under his bed, and he left the YMCA shortly thereafter. Boucher subsequently found a towel in Bowers' room that appeared to have bloodstains on it. (Iowa Supreme Court Appendix, also introduced in the District Court, at 153-174). Inexplicably, the Boucher testimony was not offered at trial.

District Court demonstrated that the Iowa Supreme Court, in concluding that the State had satisfied its hypothetical inevitable discovery test, relied on evidence that was seriously misleading. Since the failure to present this additional evidence to the state courts was excusable, the Iowa Supreme Court's misapprehension of the facts rendered its consideration of the suppression issue less than "full and fair." Consequently, whether Stone v. Powell should be extended beyond its Fourteenth Amendment context is a moot issue in the instant case, and this Court therefore should not consider it.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

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Counsel for Respondent

Certificate of Service

The undersigned hereby certifies that he received the petition for a writ of certiorari in this case on April 12, 1983, and that on the 12th day of May, 1983, he deposited one copy of the foregoing document in a United States Post Office, with first-class postage prepaid, and addressed to counsel for the petitioner:

Mr. Brent R. Appel
Deputy Attorney General
Hoover Office Building
Des Moines, Iowa 50319

The undersigned further certifies that all parties required to be served have been served.

ROBERT BAPTELS

82-1651

NO. 82-1651

RECEIVED

MAY 16 1983

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

CRISPUS NIX, Warden of the Iowa
State Penitentiary,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, Robert Anthony Williams, who is now held in the Iowa State Penitentiary at Fort Madison, Iowa, hereby asks leave to proceed in this action in forma pauperis pursuant to Supreme Court Rule 46.1 and 18 U.S.C. §3006A(d)(6).

The respondent was permitted to proceed in forma pauperis with appointed counsel in the District Court and the Court of Appeals, pursuant to 18 U.S.C. §3006A(d)(6).

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Counsel for Respondent

Certificate of Service

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Mr. Brent R. Appel
Deputy Attorney General
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Des Moines, Iowa 50319

The undersigned further certifies that all parties required to be served have been served.

15 /

ROBERT BARTELS

No. 82-1651

Office Supreme Court, U.S.

FILED

MAY 25 1983

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

CRISPUS NIX, WARDEN OF THE IOWA STATE
PENITENTIARY,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

PETITIONER'S REPLY BRIEF

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No. 82-1651

IN THE

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OCTOBER TERM, 1982

CRISPUS NIX, WARDEN OF THE IOWA STATE
PENITENTIARY,
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VS.

ROBERT ANTHONY WILLIAMS,
Respondent.

PETITIONER'S REPLY BRIEF

Petitioner Crispus Nix, Warden of the Iowa State Penitentiary, respectfully submits this Reply Brief in support of his Petition for Certiorari in the above captioned matter filed on April 7, 1983.

SUMMARY OF ARGUMENT

1. Respondent Mischaracterizes the Opinion in *Stone v. Powell*, 428 U.S. 465 (1977) as Strictly Limiting its Holding to Fourth Amendment Cases When in Fact the Words of Limitation Focus on the Character of the Evidence Involved.

2. Respondent Cannot Reasonably Assert That the Question of "Lack of Bad Faith" Was Actually Litigated in the Federal District Court Habeas Proceeding Where the Issue was not Remotely Raised in the Pleadings, was not the Subject of An Evidentiary Hearing, and was not Mentioned in Respondent's Post Trial Memorandum.

3. Notwithstanding Harsh Rhetoric of Respondent, A Strong Case Can Be Made Under Several Respectable Theories That the Inevitable Discovery Exception May Be Properly Invoked by the State in This Case.

ARGUMENT

1. Respondent Mischaracterizes the Opinion in *Stone v. Powell* as Strictly Limiting its Holding to Fourth Amendment Cases When in Fact the Words of Limitation Focus on the Character of the Evidence Involved.

Respondent and thirty-eight amici states urge certiorari be granted to consider the important question of whether the rule in *Stone v. Powell*, 428 U.S. 465 (1977) should be extended to a case involving collateral attack of a conviction based in part on highly probative and reliable evidence gathered in violation of the Sixth Amendment but which has been freed from taint by the inevitable discovery exception to the exclusionary rule. Respondent challenges the theory primarily on the ground that the rule in *Stone v. Powell* is strictly limited to Fourth Amendment cases.¹ Respondent's Brief in Opposition to Certiorari at 23-24 (hereinafter cited as Respondent's Brief) The quotations from *Stone* recruited by Respondent to support this proposition, however, are highly distorted and not presented in proper context.

¹ In addition, Respondent asserts that Williams was denied a full and fair opportunity to litigate the question of the admissibility of the evidence in state court. Respondent's Brief at 27. No such finding has been made below, however, and the issue is thus not properly before the Court. In any case, the contention is frivolous. No procedural bar prevented effective state court challenge. And even conceding arguendo that the trial court feared reversal on appeal, Respondent's Brief at 27. this fact alone hardly establishes bias or prejudice.

For instance, Respondent claims that *Stone v. Powell* indicates that “denials of Fifth and Sixth Amendment rights are different in kind from Fourth Amendment violations in that they direct by impugn the integrity of the judicial process. 428 U.S. at 479.” Respondent’s Brief at 24. This is not a fair rendition of the cited passage of the opinion, which generally distinguishes Fourth Amendment claims from Fifth and Sixth Amendment violations because Fourth Amendment infractions do not “*impugn the integrity of the fact finding process or challenge evidence as inherently unreliable*” 428 U.S. at 479 (emphasis supplied). Clearly, the Respondent’s challenge to the admission of highly reliable and probative evidence in this case does not “impugn the integrity of the fact finding process or challenge evidence as inherently unreliable.” *Id.* Moreover, the dead body of Pamela Powers and her physical condition upon discovery have not been altered or affected one iota by police conduct in this case.

Respondent also attempts to undermine this Court’s earlier observation in this case and the contention of thirty eight amici states that Williams’ guilt “was not in question.” Respondent’s Brief at 26, citing *Brewer v. Williams*, 430 U.S. at 428, 437, 441 (1977) and Illinois *Amicus* Brief at 9. Respondent observes that “the Court of Appeals specifically noted that at the second trial, Williams’ defense—that someone else killed the victim and placed her body in his room—was supported by substantial physical and scientific evidence indicating, *inter alia*, that the perpetrator, unlike Williams, was sterile.” Respondent’s Brief at 26.

Respondent also asserts that the record does not show that the victim’s body would have been found if Respondent’s constitutional rights had not been violated. Respondent’s Brief at 19-23. Since this issue was not addressed by the Court of Appeals, it too is not properly before the Court. In any case, the state trial court’s factual finding in the affirmative on this issue would be entitled to a presumption of validity, 28 U.S.C. §2254(d).

Of course, neither this Court, nor the Court of Appeals, nor the Federal District Court, sits to review the evidence *de novo*. But it should be noted that nothing occurred at the second Williams trial to suggest that the evidence in question was not highly reliable and probative with respect to the issue of the guilt of the accused. The body of Pamela Powers demonstrated beyond peradventure that she was in fact dead, had been a homicide victim, and was sexually assaulted before her death.²

Respondent attempts to conscript *Rose v. Mitchell*, 443 U.S. 549 (1979) in support of his narrow reading of *Stone*. But *Rose* is hardly a strong reaffirmation of the limited reach of *Stone*.

² At his second trial, defense counsel argued that Williams' was somehow set up by a mystery man who left the body in Williams' YMCA room. But this naked argument — obviously rejected by the jury — was not supported by Williams, who declined to take the stand, or by any other witness.

Much has been made by the Respondent, and by the Court of Appeals, of the lack of spermatozoa in the body of Powers, raising an implication that Williams, who was virile, could not have been the attacker. Respondent's Brief at 26. An expert urologist for the State, however, testified that there were a number of other potential explanations for the phenomenon besides sterility of the attacker. (Trial Tr. at 283-88).

Respondent finally grasps in a footnote for the deposition of Richard Baucher. Respondent's Brief at 27 n.14. According to Respondent, Baucher's deposition suggested the possibility that Bowers, a dead man, was the perpetrator of the crime. Respondent opines that the Baucher testimony was inexplicably not offered at trial. *Id.*

But the failure to present Baucher's testimony appears to have been the result of a strategic decision by counsel. Claims that a dead man committed a crime often do not sit well with juries. And, while it is not part of the record since the Baucher testimony was not introduced, the State exhumed the body of Bowers and was prepared to offer medical testimony to show that Bowers, like Williams, was *virile*. The defense thus could not claim that Williams could not have committed the crime because he was virile, and simultaneously point an accusing finger at the also virile Bowers.

Respondent's Brief at 25. Aside from the clear distinctions between *Ros*² and the case at bar already pointed out, see Petition for Certiorari at 15, it should be noted that the section of the Court's opinion in *Rose* declining to extend *Stone* was supported only by a bare 5-4 majority of the Court. For at least one member of the majority, the century long history of federal intervention on this issue, 443 U.S. at 545, absent here, was a crucial factor. See Stevens, J. dissenting in part, at 443 U.S. 594.

2. Respondent Cannot Reasonably Assert That The Question Of "Lack Of Bad Faith" Was Actually Litigated In The Federal District Court Habeas Proceeding Where The Issue Was Not Remotely Raised In The Pleadings, Was Not The Subject Of An Evidentiary Hearing, And Was Not Mentioned In Respondent's Post Trial Memorandum.

Respondent apparently does not claim that the issue of whether "lack of bad faith" on the part of law enforcement officers must be established before the State can invoke the inevitable discovery exception to the exclusionary rule was not in issue in the state trial court. Respondent does boldly assert, however, that the State "had ample notice" that the issue of good faith was being litigated in the habeas proceeding in the District Court. Respondent's Brief at 9.

Examination of the Respondent's pleadings in the habeas proceeding conclusively demonstrates that this contention is without merit. The pleadings simply contain no mention of the lack of bad faith issue at all, directly or by implication. For the convenience of the Court, the entire text of Respondent's pleading with respect to inevitable discovery in the federal habeas proceeding is presented here:

18. The Iowa trial court's application of the "inevitable discovery" rule violated Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution in that:

a. The "inevitable discovery" rule applied by the Iowa courts is itself violative of the Fifth, Sixth, and Fourteenth Amendments;

b. In requiring the prosecution to show only by a preponderance of the evidence, that the body would have been discovered "in any event", the Iowa courts used an inadequate burden of proof;

c. The Iowa courts erred in finding that the prosecution had met even the preponderance of the evidence burden.

Respondent's Supplemental Petition, at 3 (Reply Appendix A).

The pleadings fairly raised the question of whether the inevitable discovery exception exists at all, whether the prosecution needs to show only by a preponderance of evidence that the body would have "in any event" been discovered, and whether the prosecution met even a preponderance of the evidence burden. But there is plainly no suggestion that the Respondent was challenging the conviction on the ground that the State failed to show "lack of bad faith" on the part of law enforcement officials.

The issue was not raised in the Federal District Court pleadings notwithstanding the fact that the Iowa Supreme Court flagged "lack of bad faith" as a potential issue. The failure to raise the issue in the pleadings is particularly significant where the Respondent is represented by highly sophisticated counsel.³ The most obvious conclusion is that everyone on both sides thought good faith was not an issue because of the close division of the best legal minds on the question.

³ Throughout the present habeas proceeding, Williams has been represented by a Professor of Criminal Law at the University of Iowa (now at the University of Arizona) and by the Prisoner Assistance Clinic of the College of Law at the University of Iowa.

Given this state of the record, it is not surprising that the District Court made no finding on the lack of bad faith issue. The question simply was not litigated. Thus, the Eighth Circuit's observation that a finding of good faith is "utterly without record support", *Williams v. Nix*, 700 F.2d at 1170 (8th Cir. 1983) (Pet. at A11-A12), is hardly an indictment, but is the natural outcome of a properly focused habeas proceeding limited to claims actually presented to the Court.

Respondent post hoc attempts to raise the issue omitted from the pleadings after its surprising resurrection in the Court of Appeals cannot be based on citations to briefs before the District Court. The first passage cited by Respondent is simply a description of the holding of the Iowa Supreme Court. Respondent's Brief at 6-7 (citing "memorandum filed March 30, 1981," p. 21). It is totally devoid of legal argument with respect to lack of bad faith. The second citation is to a part of the brief which questions whether the inevitable discovery exception to the exclusionary rule exists *at all*. The argument presented here was that speculation of what would have been discovered cannot ever constitutionally free evidence from the taint of underlying illegality. *Id.* at 7 (March 30, 1981 Memorandum at 25.) These passages in briefs can hardly be considered an amendment to the pleadings sufficient to raise the question of whether in this case, Detective Leaming acted with "a lack of bad faith."

Indeed, if anything, Respondent's briefing demonstrates that the Respondent himself did not even believe the issue was fairly raised. The State admittedly put on no evidence at the habeas proceeding on the lack of bad faith issue. If Respondent believed the issue was fairly raised and was confronted with such a complete failure to contest the issue, one would expect the Respondent's Post Hearing Memorandum to pounce on the issue. But not one word on the issue — *not one word* — is contained in the Respondent's Post Hearing Memorandum. See Petitioner's Post Hearing Memorandum, pp. 1-13 inclusive (Reply Appendix B). Obviously, Respondent, like the State and like the District Court, did not believe the issue had been litigated.

Because the Court of Appeals reached out to reverse the District Court's denial of habeas on an issue not actually litigated below, the judgment should be reviewed through exercise of this Court's habeas jurisdiction.

3. Notwithstanding Harsh Rhetoric Of Respondent, A Strong Case Can Be Made Under Several Respectable Theories That The Inevitable Discovery Exception May Be Properly Involved In This Case.

Respondent goes to great length to trivialize the Petitioner's contention that the inevitable discovery rule should apply in this case. While full presentation of the dimension of this question must await review on the merits, several rebuttal points may assist the Court in determining whether to exercise its certiorari jurisdiction.

Though Leaming was found by this Court to have crossed the constitutional line in statements he made to Williams, *Brewer v. William*, 430 U.S. 387 (1977) there is already substantial evidence in the record (which could have been buttressed by Leaming's own testimony if the state had received a fair opportunity to do so) that Leaming thought he was acting constitutionally. Certainly an inference can be made that where even learned judges are in doubt, it is unlikely that Leaming *knew* he was acting unconstitutionally. In addition, Leaming carefully avoided questioning the accused, thus attempting to conform to *Miranda* strictures. If he did not respect constitutional restraints, he would have shown no such inhibitions. See Petition for Certiorari at 10.

Respondent repeatedly claims that Leaming agreed not to interrogate Williams. The citations do *not* support the assertion. Nowhere in the record is there any suggestion that Leaming *himself* agreed to anything. Police officials in Des Moines agreed, with Williams attorney via telephone, not to interrogate the accused when in transit between Davenport and Des

Moines, but Learning, who may not have had full knowledge of the agreement, clearly expressed reservations when defense counsel demanded his acquiescence. See *Brewer v. Williams*, 430 U.S. at 391-92.

In any case, a substantial case can be made that Learning thought his subsequent activities—in which he carefully avoided direct questioning of the accused—were consistent with the constitution and whatever agreement was either present or to which Learning had knowledge.

Respondent claims that it cannot possibly be said that Learning acted in good faith because of the existence prior to his questionable actions of *Massiah v. United States*, 377 U.S. 201 (1964). This argument is without merit. In *Massiah*, the accused had absolutely no idea that the infiltrant was a police officer. *Massiah* is thus plainly and materially distinguishable on its facts.

Finally, Respondent contends no split exists in the circuits on the question of whether good faith must be established to invoke the inevitable discovery exception. It is claimed that the good faith issue was not raised in the cases cited as conflicting in the Petition for Certiorari. Respondent's Brief at 13. Petitioner does not have access at present to the pleadings at the Federal District Court level in these cases. If the pleadings resemble that of Respondent in this case, see page 6 *supra*, the point may be well taken. But even assuming arguendo no conflict technically exists, the sweeping and unqualified language in some of the opinions, see *United States v. Brookings*, 614 F.2d 1037, 1042 n.2 (5th Cir. 1980) (inevitable discovery requires "simply a reasonable probability that the evidence in question would have been discovered in any event other than by the tainted source." emphasis supplied) will present an apparent conflict to the federal trial bench seeking appellate guidance.

CONCLUSION

For the above reasons, and for the reasons cited in the Petition for Certiorari, the Petitioner respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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FILED

MAY 25 1983

ALEXANDER L. STEVAS,
CLERK

NO. 82-1651

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

CRISPUS NIX, WARDEN OF THE IOWA STATE
PENITENTIARY,
PETITIONER,
vs.
ROBERT ANTHONY WILLIAMS,
RESPONDENT.

APPENDIX TO REPLY BRIEF

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May 31, 1983

PROOF OF SERVICE

On the 31st day of May, 1983, I, the undersigned, did serve the within Appendix on all other parties to this appeal by mailing two copies thereof to the respective counsel for said parties:

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APPENDIX A (NIX V. WILLIAMS)

NO. 82-1651

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROBERT ANTHONY WILLIAMS,)	
)	
Petitioner,)	CIVIL NO. 80-450-D
)	
vs.)	SUPPLEMENTAL PETI-
)	TION FOR WRIT OF
DAVID SCURR, Warden of the)	HABEAS CORPUS
Iowa State Penitentiary at)	
Fort Madison, Iowa,)	
)	
Respondent.)	

I

1. This petition is filed as a supplement to the Questionnaire-Petition that Petitioner is filing contemporaneously herewith pursuant to Rule 26 of the Local Rules of this Court. The Questionnaire-Petition and this Supplemental Petition are filed pursuant to 28 U.S.C. §§ 2241(c) and 2254, in that Petitioner is in state custody in violation of the United States Constitution.
2. Petitioner is an inmate currently in the custody of the Respondent, who is Warden of the Iowa State Penitentiary.

3. On July 15, 1977, in the Iowa District Court in and for Linn County, Iowa, a jury convicted Petitioner of first-degree murder. On August 19, 1977, Petitioner was sentenced to life imprisonment.

4. Venue is proper in this Court under 28 U.S.C. § 2241(d), in that Petitioner is confined within this District.

5. Petitioner has exhausted his state remedies under 28 U.S.C. § 2254(b) with respect to the issues presented in this Petition through a direct appeal from his conviction to the Iowa Supreme Court. The Iowa Supreme Court denied relief on November 14, 1979. State v. Williams, 285 N.W.2d 248 (Iowa 1979). The same court denied rehearing on December 13, 1979.

II

6. Prior to trial, Petitioner twice requested that Mr. Sheldon Otis, an attorney from San Francisco, California, be appointed to represent him.

7. Mr. Otis had tried numerous serious felony cases, and was willing and able to accept appointment at no special cost to the county.

8. Mr. Otis' competence and willingness to serve as Petitioner's counsel were undisputed. The trial court indicated that if Mr. Otis had been retained, he would have been allowed to appear.

9. Even though the facts in Paragraphs 6-8, supra, were true, the trial court denied Petitioner's application for Mr. Otis's appointment.

10. No countervailing state interests existed to justify denying Petitioner's choice of appointed counsel.

11. The Iowa trial court's failure to allow Petitioner to select the counsel to whom he wished to entrust his defense, when such counsel was available and no countervailing state interests were involved, deprived Petitioner of his qualified right to select the counsel of his choice under the Sixth and Fourteenth Amendments to the United States Constitution.

12. The Iowa trial court's denial to Petitioner, an indigent defendant, of the same right to choose counsel that is given to defendants of sufficient means, solely on the basis of wealth and without any

substantial reason, irrationally discriminated against Petitioner in violation of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Petitioner prays that his conviction referred to in Paragraph 3 be reversed.

III

13. In Brewer v. Williams, 430 U.S. 387 (1977), the United States Supreme Court held that statements concerning the location of the body of the victim in this case had been obtained by law enforcement officers from Petitioner in violation of his Sixth and Fourteenth Amendment right to counsel.

14. Petitioner's statements concerning the location of the victim's body were obtained in violation of Petitioner's Fifth and Fourteenth Amendment rights in that a police officer continued to interrogate Petitioner after Petitioner indicated his choice to remain silent, and in that the statements were not voluntary. Williams v. Brewer, 375 F.Supp. 170 (S.D. Ia. 1974), aff'd, 509 F.2d 227 (8th Cir. 1975), aff'd, 430 U.S. 387 (1977).

15. These illegally obtained statements in fact led police officers directly to the victim's body.

16. Prior to trial, Petitioner filed a Motion to Suppress evidence of the discovery of the body or evidence relating to the body.

17. The Iowa trial court overruled this motion to suppress and permitted the prosecution to introduce evidence recovered from the body -- including semen, hair samples, and evidence of the cause or death -- on the ground that the prosecution had shown, by a preponderance of the evidence, that the body would have been found "in any event". The Iowa Supreme Court affirmed this ruling on appeal.

18. The Iowa trial court's application of the "inevitable discovery" rule violated Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution in that:

a. The "inevitable discovery" rule applied by the Iowa courts is itself violative of the Fifth, Sixth, and Fourteenth Amendments;

b. In requiring the prosecution to show only by a preponderance of the evidence, that the body would have been discovered "in any event", the Iowa courts used an inadequate burden of proof;

c. The Iowa courts erred in finding that the prosecution had met even the preponderance-of-the evidence burden.

19. Petitioner did not have a fair opportunity to litigate the claim of "inevitable discovery" in state court.

WHEREFORE, Petitioner prays that the conviction referred to in Paragraph 3 be reversed.

IV

20. Prior to trial, on May 16, 1977, Petitioner petitioned the trial court for a change of venue, citing the existence of prejudice and prejudicial publicity in Polk County. Petitioner asked that the court authorize public opinion surveys of a small number of potential trial sites and requested that a new venue not be set pending the results of such surveys.

21. On May 27, 1977, the trial court granted a change of venue, to Linn County, but denied the motion for opinion polls of potential trial sites.

22. Petitioner's case had generated an extraordinary amount of statewide pretrial publicity, including print and broadcast media reporting on the

first trial, the United States Supreme Court's 1977 reversal of Petitioner's 1969 conviction and numerous "facts" about the case. Given this massive, unfavorable publicity, the choice of trial site was extremely important to Petitioner's defense and to a fair trial.

23. Without an opinion survey or some substitute, the selection of an appropriate venue could not be made on any rational basis. The trial court itself acknowledged that it did not have any basis for selecting an alternative trial site.

24. The Iowa trial court's denial of Petitioner's Motion for Authorization of Public Opinion Polls for Purposes of Venue Selection denied Petitioner the effective assistance of counsel, due process, and equal protection, as guaranteed to him by the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Petitioner respectfully prays that the conviction referred to in Paragraph 3 be reversed.

V

25. During the voire dire examination of prospective juror Victoria Neuzil, it was established that Mrs. Neuzil had been exposed to information

that Petitioner had pointed out to the police the location of the body of the victim.

26. During voir dire, Mrs. Neuzil made several statements indicating that she was unable to presume Petitioner innocent; that she could not put out of her mind what she already knew; and that it would be difficult for her to be a fair and impartial juror. Despite numerous questions by the prosecution and the defense, Mrs. Neuzil never stated that she could be a fair and impartial juror.

27. The trial court denied Petitioner's challenge for cause of Mrs. Neuzil. This denial constituted a violation of Petitioner's Seventh and Fourteenth Amendment rights to a fair and impartial jury and to due process.

WHEREFORE, Petitioner prays that the conviction referred to in Paragraph 3 be reversed.

VI

28. At the close of all the evidence, Petitioner moved for a directed verdict of acquittal of the charge that he had committed first-degree murder by killing the victim with malice aforethought, pre-

meditation, and deliberation. The trial court overruled this motion, and included in its instructions to the jury an instruction on premeditated and deliberated first-degree murder.

29. There was no direct evidence of the circumstances of the victim's death. All that was established in this regard was that the victim died of asphyxiation, probably as a result of smothering, and that she had been sexually molested, but not penetrated, at or after the time of death.

30. This evidence legitimately supported an inference that the victim was killed with malice. The fact of the killing, however, could not then properly be used to infer premeditation and deliberation.

31. To convict of first-degree murder, there must be proof that the accused actually premeditated and deliberated, for the following reasons:

a. The legislature purposely divided murder into two degrees with different punishments afforded each;

b. The accused has the Due Process right to be convicted of a crime only upon proof beyond a reasonable doubt of all the elements of that crime;

c. Permitting conviction for premeditated first-degree murder solely on a showing of opportunity to deliberate, rather than actual deliberation and premeditation, would fail to provide objective standards [sic] to the jury.

32. For the reasons stated above, the lower court's denial of Petitioner's motion for directed verdict on the charge of premeditated and deliberated first-degree murder denied Petitioner the fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Petitioner prays that the conviction referred to in Paragraph 3 be reversed.

VII

33. The indictment charged that Petitioner violated sections 690.1 and 690.2, Code of Iowa (1966), in that he "did with malice aforethought premeditation, deliberation, and intent to kill, murder Pamela Powers...."

34. The trial court's Instruction No. 8 permitted the Petitioner to be found guilty of first-degree murder on two theories: (a) on the "premeditation" theory mentioned in the preceding Paragraph, and (b) on the theory that Petitioner murdered the victim in the perpetration of a felony, viz., attempted rape.

35. When an indictment cites to the code section violated and defines in specific, narrowing terms the manner in which the offense was committed, the instructions to the jury must be in conformity therewith.

36. The variance between the indictment and the instructions to the jury deprived Petitioner [sic] of his right to be tried solely on the charges contained in the indictment, as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Petitioner prays that the conviction referred to in Paragraph 3 be reversed.

VIII

37. Instruction No. 8 informed the jury that they could convict Petitioner of first-degree murder if they found beyond a reasonable doubt that Peti-

tioner killed the victim (1) willfully and unlawfully, (2) with malice aforethought, and (3) with premeditation, deliberation and specific intent or in the perpetration of the crime of attempted rape.

38. The third element of the instruction described the two alternative factual means by which first-degree murder may be committed, but the instruction failed to require the jury to agree on which of these two alternatives was applicable to Petitioner's actions.

39. Consequently, the verdict could have been a non-unanimous one, for example, with six jurors believing that Petitioner was guilty of premeditated murder but not felony murder and six jurors believing Petitioner was guilty of felony murder but not premeditated murder.

40. Instrucion [sic] No. 8 therefore deprived Petitioner of his fundamental rights to trial by jury and to proof beyond a reasonable doubt before conviction, as guaranteed by the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Petitioner prays that the Court reverse the conviction referred to in Paragraph 3 above.

Respectfully submitted,

/s/
Robert Anthony Williams

APPENDIX B (NIX V. WILLIAMS)

NO. 82-1651

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROBERT ANTHONY WILLIAMS,)	
)	
Petitioner,)	
)	CIVIL NO. 80-450-D
v.)	
)	
DAVID SCURR, Warden of)	
the Iowa State Penitentiary,)	
Fort Madison, Iowa,)	
)	
Defendant.)	

PETITIONER'S POST-HEARING MEMORANDUM

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROBERT ANTHONY WILLIAMS,)	
)	
Petitioner,)	CIVIL NO. 80-450-D
)	
v.)	PETITIONER'S POST-HEARING
)	
)	MEMORANDUM
DAVID SCURR, Warden of)	
the Iowa State Penitentiary,)	
Fort Madison, Iowa,)	
)	
Defendant.)	

I. INTRODUCTION

Because Petitioner anticipated that he would present additional evidence relating to the motion-to-suppress ("inevitable discovery") issue in this case at the August 3 hearing, he did not address this issue in his Reply Memorandum (filed July 13, 1981). Consequently, this Memorandum will first respond to the legal arguments regarding "inevitable discovery" that were made in Respondent's Brief of April 1, 1981. The Memorandum will then discuss the impact of the evidence presented at the August 3 hearing on the issue of whether the victim's body would have been discovered in the absence of the Fifth and Sixth Amendment violations that led law enforcement officers to the victim's body on December 26, 1968. Finally, the Memorandum will address the Stone v. Powell issue raised by Respondent.

II. THE HYPOTHETICAL "INEVITABLE DISCOVERY" TEST APPLIED BY THE IOWA SUPREME COURT WAS CONSTITUTIONALLY IMPROPER.

A. Respondent relies heavily on the Iowa Supreme Court's analysis of the split in the United States Court of Appeals regarding the "inevitable discovery"

doctrine, and updates that analysis with more recent circuit decisions. (Brief at 7-9). Given the split in the circuits, and the absence of any definitive inevitable discovery decision in the Eighth Circuit, this "counting of courts" is not terribly useful in the instant case. However, Petitioner would note that the Iowa Supreme Court's and Respondent's analysis of the circuit court precedents is quite misleading, for several reasons.

1. In at least four of the decisions counted by the Iowa Supreme Court -- United States v. Soehnlein, 423 F.2d 1051 (4th Cir.), cert. denied, 399 U.S. 913 (1970); United States ex rel. Owens v. Twomey, 508 F.2d 858 (7th Cir. 1974); Wayne v. United States, 318 F.2d 205 (D.C. Cir.), cert. denied, 375 U.S. 860 (1963); and United States v. Schmidt, 573 F.2d 1057 (9th Cir.), cert. denied, 439 U.S. 881 (1978) -- the court's references to the inevitable discovery doctrine were pure dictum. See United States v. Alvarez-Porras, 643 F.2d 54, 64 (2d Cir. 1981); United States v. Hoffman, 607 F.2d 280 (9th Cir. 1979).

2. The Second Circuit decision counted on by the Iowa Supreme Court -- United States v. Ceccolini, 542 F.2d 136 (2d Cir. 1976), rev'd on other grounds, 435 U.S. 268 (1978) -- involved discovery of a live witness, rather than physical evidence. ^{1/} Moreover, it is not clear that the court of appeals in Ceccolini actually applied the inevitable discovery doctrine in reaching its result. Finally, other Second Circuit decisions have rejected the inevitable discovery doctrine. United States v. Paroutian, 249 F.2d 486, 489 (2d Cir. 1962); United States v. Alvarez-Porras, supra.

3. As Respondent concedes, the Ninth Circuit -- which the Iowa Supreme Court counted as supporting the inevitable discovery doctrine, 285 N.W.2d at 256 -- has indicated that it has not adopted that doctrine. United States v. Hoffman, 607 F.2d 280, 285 (9th Cir. 1979).

4. Thus, only one circuit -- the Third, see Virgin Islands v. Gereau, 502 F.2d 914, 927-28 (3d

^{1/} The Supreme Court emphasized this distinction in its opinion in Ceccolini. See 435 U.S. at 276-77.

Cir. 1974), cert. denied, 420 U.S. 909 (1975) -- has actually adopted the inevitable discovery doctrine. And in Gereau, the court required that inevitable discovery be demonstrated by clear and convincing evidence, a far more stringent test than the "preponderance" standard used by the Iowa Supreme Court.

5. Respondent attempts to add the Fifth Circuit to the inevitable discovery column by reference to United States v. Brookins, 614 F.2d 1037 (1980). But the Brookins decision is clearly distinguishable, and adopts -- in dictum -- only a very narrow version of the inevitable discovery doctrine that is inapplicable to the instant case. The defendant in Brookins sought to exclude the testimony of a witness because his identity had been obtained through an illegal interrogation. The court of appeals first held that the discovery of the witness was too attenuated from the interrogation to be tainted thereby, relying on Ceccolini v. United States, 435 U.S. 268 (1978). 614 F.2d at 1042-44. In the alternative, the court found that the witness would have been discovered even without the illegal interrogation.

In doing so, however, the court emphasized two factors that were critical to its use of what it characterized as a 'narrow' version of the "inevitable discovery exception": (a) that the prosecution demonstrated that the police possessed the leads that made discovery inevitable prior to the illegal interrogation; and (b) that "the evidence in question was the voluntary testimony of a witness." 614 F.2d at 1042, n.2. Of course, neither of these factors was present in the instant case.^{2/}

6. In sum, only one Circuit -- the Third -- has actually adopted an inevitable discovery doctrine like that used by the Iowa Supreme Court in the instant case; and that Circuit has required the prosecution to meet a more stringent burden of proof than a mere "preponderance of the evidence." At the same time, at least one Circuit has clearly rejected the doctrine.

^{2/} The "prior leads" factor serves to mitigate the emasculating effect on constitutional protections of permitting the police an inevitable discovery loophole. And the distinction between live witnesses and other kinds of evidence has been recognized by the United States Supreme Court, see United States v. Ceccolini, 435 U.S. 268, 276-77 (1978), quoted at p. 10 of Respondent's Brief.

United States v. Griffin, 502 F.2d 959 (6th Cir.,
cert. denied), 419 U.S. 1050 (1974).^{3/} This is
hardly overwhelming precedential support.^{4/}

B. Respondent simply ignores the Supreme Court precedents, including Wong Sun v. United States, 371 U.S. 471 (1964), Brown v. Illinois, 422 U.S. 590 (1975), and United States v. Wade, 388 U.S. 218 (1967), that demonstrate that the proper test for deciding the motion to suppress was whether the victim's body in fact was

^{3/} Both the Iowa Supreme Court and Respondent characterize Griffin as an opinion that could be read "either way." However, a reading of Griffin demonstrates that it rejects the inevitable discovery doctrine as emasculating the warrant requirement of the Fourth Amendment. 502 F.2d at 961. See United States v. Alvarez-Porras, supra, 643 F.2d at 64-65.

^{4/} Respondent also relies on Killough v. United States, 336 F.2d 929 (D.C. Cir. 1964). (Brief at 6-7). However, in Killough, the court emphasized that the discovery of the victim's body went solely to the fact that the victim was deceased, and did not serve to connect the defendant with the crime; in the instant case, on the other hand, the discovery of the body produced additional evidentiary items. Moreover, the status of Killough as precedent is placed in doubt by the decision in Crews v. United States, 389 A.2d 277 (D.C. 1978) (en banc), rev'd on other grounds, 100 S.Ct. 1244 (1980).

discovered by means "sufficiently distinguishable" from the unconstitutional interrogation of Petitioner -- not whether the body hypothetically would have been discovered even if that interrogation had not taken place. Under the former test, of course, there is no legitimate question about the result in this case, since the discovery of the body in fact was the direct and immediate result of Petitioner's statements to the police.

III. EVEN IF THE HYPOTHETICAL INEVITABLE DISCOVERY DOCTRINE WERE PROPER, THE BURDEN OF PROOF APPLIED BY THE IOWA SUPREME COURT WAS INSUFFICIENTLY STRINGENT.

Since Respondent does virtually nothing to address the argument that the preponderance-of-the-evidence burden of proof utilized by the Iowa Supreme Court was not sufficiently strict, Petitioner need add little to his Memorandum in Support of Petition on this question. Petitioner would only note that Respondent's attempt to equate the "preponderance" test with the "actualities, not possibilities" language he attributes to Hoffman, supra (Brief at 11) is fatally flawed, since that language actually comes from United States v. Paroutian, 299 F.2d 486, 489 (2d Cir. 1962) -- which rejected the inevitable

discovery doctrine. United States v. Hoffman, supra, 607 F.2d at 285, n.3.

IV. THE RECORD DOES NOT SHOW THAT THE VICTIM'S BODY WOULD HAVE BEEN FOUND IN THE ABSENCE OF THE ILLEGAL INTERROGATION OF PETITIONER.

The legal errors discussed in Division II and III, supra, by themselves require reversal of Petitioner's conviction. However, Respondent's defense of the hypothetical "inevitable discovery" doctrine necessitates an analysis in this Memorandum of the question of whether the victim's body would have been discovered "in any event" (i.e., even in the absence of the illegal interrogation of Petitioner).

The Iowa Supreme Court held that the victim's body would have been discovered even if Petitioner had not shown the police where the body was. In arriving at this conclusion, that court found (1) that the organized search for the victim would have extended into Polk County, to the area where the body was found, and (2) that the searchers would have seen the body because it was highly visible. State v. Williams, 285 N.W.2d 248, 262 (Iowa 1979).

The record in this case, and especially the additional evidence presented at the August 3, 1981, hearing, demonstrates that the Iowa Supreme Court's above-described findings were clearly erroneous, and that in fact it is highly unlikely that the search that was instituted on December 26, 1968, would have discovered the body. A fortiori, of course, the prosecution failed to meet its burden to show that the body would have been discovered "in any event," even under a preponderance-of-the-evidence standard.

Because of the nature of the additional evidence that was presented on August 3, it will be most convenient to address these matters in a more or less reverse chronological order, from the body backwards to the initiation of the search.

A. Even If The Search Had Extended Into Polk County To The Area Where The Body Was Located, Searchers Would Not Have Found The Body.

1. Visibility of the body

The Iowa Supreme Court relied on two photographs admitted into evidence at the 1977 motion to suppress hearing (Petitioner's Exhibits 3 and 5 in this pro-

ceeding) to find that the body would have been visible to searchers. It was critical to this finding that the Supreme Court believed that Exhibits 3 and 5 showed the body as it appeared when the police first found it:

The State also introduced photographs showing the body as it was actually found. These photographs show that Pamela Powers's body would not have been hidden by the inch of snow which accumulated in the area in the evening of December 26. . . . In addition, the left leg of the body was poised midair, where it would not have been readily covered by a subsequent snowfall.

State v. Williams, 285 N.W.2d 248, 262 (Iowa 1979).^{5/}

(Emphasis added). The court apparently based this belief on testimony at the motion to suppress hearing by Mr. Thomas Ruxlow, an agent with the Bureau of Criminal Investigation (BCI), that Exhibit 5, showed

^{5/} Although the Iowa Supreme Court did not refer to the photographs by exhibit number, it is clear that the above-quoted language deals with Exhibits 3 and 5, since they were the only photographs of the body introduced at the suppression hearing.

the body exactly as it was found. ^{6/}

The additional evidence presented on August 3 in the instant proceeding establishes beyond any question that the Iowa Supreme Court's belief that Exhibits 3 and 5 showed the body as it was found was incorrect (albeit through no fault of that court's). Thus, at his July 16, 1981, deposition, Mr. Ruxlow conceded that Exhibit 5 was taken after the scene had been altered and snow had been removed. (Ruxlow Dep. Tr. at 17). Even without Mr. Ruxlow's deposition testimony, Petitioner's Exhibit 1 demonstrates clearly

^{6/} Mr. Ruxlow's testimony with respect to Petitioner's Exhibit 5 (Exhibit D at the motion to suppress hearing) is at p. 42 of the transcript of the motion to suppress hearing:

Q. I hand you what has been marked State's Exhibit D and ask you if you can tell me what that depicts, if you know?

A. That's the same culvert as in State's Exhibit C. This is taken a little further away and it shows the, once again, the body of Pamela Powers on the west side of the culvert on the north side of the road.

Q. Has snow been removed or trampled down as indicated in State's Exhibit D?

A. No. That's exactly the way it was found.

that Exhibit 5 could not possibly show the body as it was found. While Exhibit 5 shows the body almost completely exposed to view, Exhibit 1 shows the body covered with a blanket of snow and obscured by brush.

The record also shows that Exhibit 3 (Exhibit C at the 1977 suppression hearing) was not of the body as it was found. Mr. Carroll Dawson, who was called to the scene with the Identification Section of the Des Moines Police Department, testified at the 1969 trial, and again at the 1977 motion to suppress hearing, that another officer took a single initial photograph of the body as it appeared when it was found. After this first photograph was taken, the body was moved, and the scene altered. ^{7/} Exhibit 1, in which

^{7/} Petitioner's Exhibit 13 is the portion of Mr. Dawson's testimony at the 1969 trial that pertains to the photographs taken at the scene. At p. 189, Mr. Dawson states: "(a)fter the first initial photograph was taken, showing the body partially covered with snow, we did brush the snow away and take additional photographs." (T. 189; emphasis added). At the motion to suppress hearing, Mr. Dawson testified that "after the initial photograph was taken, then we brush away -- I brushed part of the snow and found her to be frozen against the cement culvert. (Motion to Suppress Tr. at 22-23) (emphasis added).

the body is virtually indiscernable, must be the initial photograph to which Mr. Dawson referred. Thus, all the other photographs presented at the hearing on August 3 were taken after the scene had been disturbed. ^{8/}

In short, the only photograph that shows the body as it was found is Exhibit 1, which shows that the body was covered with snow and obscured by brush. ^{9/} Even though that photograph was taken at close range from above, the body is barely visible. Exhibit 1 is vivid proof that even if searchers had been walking along the road beside the culvert, they probably would not have seen the body.

8/

Even Petitioner's Exhibit 2, in which the body is still snow-covered and barely discernible, was taken after the scene was disturbed. This can be seen by comparing Exhibit 1 and 2. In the latter, but not in the former, there is a line of no snow between the culvert and the body. Moreover, two sticks at the body's left hip are visible in Exhibit 2 but not in Exhibit 1.

9/

Although Exhibit 2 was taken after the scene was disturbed, it does show the brush that covered at least portions of the body.

2. Visibility of the culvert

The preceding paragraphs show that it is unlikely that the body would have been discovered even assuming that searchers would have gotten out of their vehicles in the area where the body was located. However, the record shows that even this assumption is not warranted. Mr. Ruxlow testified at the 1977 motion to suppress hearing the searchers generally looked for the body from their vehicles. (Motion to Suppress Tr. at 47-48). If they saw a "culvert or any out-building of an abandoned farm," they were supposed to get out of their cars to search the area thoroughly. (Motion to Suppress Tr. at 48). Obviously, if they could not see a culvert, they would not stop to search it.

Petitioner's Exhibits 7, 8 and 9 are photographs taken from the road approaching the culvert where the body was located. Although all of these photographs show the location of the culvert, it is not

visible in any of them. ^{10/} Even in Exhibit 7, which was taken within close proximity to the culvert, the culvert is indiscernible. The searchers, therefore, would not have gotten out of their cars to search the area thoroughly, and thus could not have found the body even if it had been more visible than Exhibit 1 shows it was.

B. The Search Would Not Have Continued Into Polk County, Where The Body Was Located.

The preceding paragraphs show that even if searchers had searched for the victim's body along the Polk County road beside which it was found, it is unlikely that they would have found it. The record also shows that the search would not have extended into Polk County in the first place.

10/

At the July 16, 1981, deposition of Mr. Ruxlow, counsel for Respondent elicited testimony, through leading questions, that a tree line depicted in suppression Exhibits A and B would indicate to a "person who has grown up in Iowa that there's liable to be a culvert in that area." (Ruxlow Depo. Tr. at 39). However, this testimony is effectively contradicted by Petitioner's Exhibit 21 (Aff. of William Ponder).

At 8:00 a.m. on December 26, 1968, Mr. Ruxlow reported to his superior, BCI Agent Mayer, in Grinnell with the assignment of organizing a search for the victim. Mr. Ruxlow testified at the 1977 suppression hearing and at his 1981 deposition that even as of 8:00 a.m., the plan was to include Polk County in the search if necessary. (Motion to Suppress Tr. at 36; Depo. Tr. at 22). However, this testimony is belied by the other evidence in the record. Both Mr. Ruxlow's BCI Report (Exhibit 11) and Agent Mayer's BCI Report (Exhibit 12) specify that the search was to be conducted in Jasper and Poweshiek counties; neither report makes any mention of Polk County. Moreover, Mr. Ruxlow made preparations to search only in Jasper and Poweshiek counties. These preparations included obtaining maps of those counties; marking off the areas to be searched into grids; and assigning groups of volunteer searchers to specific grids (Motion to Suppress Tr. at 34). However, none of these steps was taken with regard to Polk County. (Motion to Suppress Tr. at 39).

Nor does the record support a conclusion that Mr. Ruxlow formed an intent to search in Polk County later in the day on December 26, 1968. At 3:00 o'clock that afternoon, the searchers were approaching the western boundary of Jasper County, having completed the planned search of Poweshiek County. (Motion to Suppress Tr. at 59). At that time, Agents Ruxlow and Mayer received a radio message to meet BCI Agent John Jutte at the Grinnell Interchange at Interstate 80. (Motion to Suppress Tra. at 51: Depo. Tr. at 20). They did so, leaving ~~no one~~ in charge of the search, and not knowing how long they would be gone. (Motion to Suppress Tra. at 51-52, 59).

At the Grinnell Interchange, Agents Mayer and Ruxlow talked with Agent Jutte and with Detective Leaming of the Des Moines Police Department. Detective Leaming requested that Agents Mayer and Ruxlow follow him as he proceeded west on I-80. (Ruxlow Depo. Tr. at 25-26). At this time, Agent Ruxlow had no information that Petitioner would lead the officers to the victim, and he did not know why he was following Detective Leaming or how long he

would be doing so. (Ruxlow Depo. Tr. at 25-28).

Agent Ruxlow also did not know whether the victim was dead or alive. (Ruxlow Depo. Tr. at 24).

Nevertheless, Mr. Ruxlow (and Mr. Mayer) did follow Detective Leaming.

Given these facts, Mr. Ruxlow's testimony that he intended to continue the search into Polk County defies belief. If Mr. Ruxlow had intended to continue the search into Polk County, it simply would not have made sense for him to abandon the search to follow Detective Leaming, for no known purpose and for an unknown length of time, when there were still two hours of daylight left, a group of searchers was already organized and available, and there still was a possibility that the victim was alive. Especially in light of all the other circumstances, the fact that Mr. Ruxlow and Mr. Mayer left Grinnell precisely at the time that the search of Jasper County was being concluded is too "neat" a coincidence to be credible. A far more logical explanation is that the intent was to search only Poweshiek and Jasper Counties, and that

Mr. Ruxlow and Mr. Mayer decided to leave Grinnell to follow Detective Leaming at 3:00 p.m. because they knew at that time that the searchers were about to complete the planned search of Powshiek [sic] and Jasper Counties. 11/

C. Conclusion.

Even under the Iowa Supreme Court's constitutionally improper "inevitable discovery" test, the prosecution in the instant case was required to demonstrate that it was more probable than not that Agent Ruxlow's searchers would have continued into Polk County and would have seen the culvert under which the body was hidden and would have seen the body despite the snow and brush that covered it. On the record in the instant case, however, it cannot reasonably be concluded that the State met even a "preponderance" burden with regard to any of these

11/ In judging the credibility of Mr. Ruxlow's explanation, it should be kept in mind that he was informed prior to the 1977 suppression hearing that the issue at that hearing would be whether his search would have discovered the victim's body in Polk County (dep. Tr. at 30), and that he testified incorrectly at the suppression hearing about what Exhibit 5 depicted.

propositions, let alone all of them. ^{12/} To accept Respondent's "hypothetical probable inevitable discovery" argument on the facts of this case would be effectively to declare that virtually any showing would permit the State to escape the consequences of constitutional violations committed by its law enforcement agents.

V. TOWNSEND V. SAIN AND 28 U.S.C. § 2254(d)

At the hearing of August 3, 1981, this Court raised the question of whether it should consider the evidence introduced at that hearing that was not introduced in the state trial court in State v. Williams, rather than requiring Petitioner to first present that evidence to the state courts. As the succeeding paragraphs will show, the answer to that question is clearly "Yes."

12/

It should be noted that even if the prosecution had shown that each of the propositions, taken individually, was more likely than not, it would not follow that it was more likely than not that all three were true. (For example, if the probability of each proposition was as high as 3/4, the probability that all three propositions were true would be $3/4 \times 3/4 \times 3/4 = 27/64$, or considerably less than 1/2).

At the August 3 hearing, the arguments of counsel on the question stated above centered on 28 U.S.C. § 2254(d). However, since § 2254(d) is essentially a codification of Townsend v. Sain, 372 U.S. 293 (1963), see Procunier v. Atchley, 400 U.S. 446, 451 n.6 (1971), Hawkins v. Bennett, 423 F.2d 948, 950 (8th Cir. 1970), it will be useful to begin with a discussion of that case. In Townsend, a federal habeas corpus petitioner claimed that a confession that had been introduced at his state-court murder trial was the product of coercion. The district court and court of appeals denied relief, holding that the state court's finding that the confession was voluntary was correct. Both courts specifically held that a federal habeas corpus court's inquiry was limited to the undisputed portions of the state-court record. The Supreme Court reversed, holding that the district court was required to hold a hearing to consider evidence which had not been presented to the state courts, but which bore on the constitutionality of the petitioner's detention. In Townsend,

the court referred specifically to evidence that a drug administered to the petitioner prior to his confession (hyoscine) was characterized as a "truth serum," and concluded that this was "crucially informative" evidence that "would have enabled the judge and jury . . . intelligently to grasp the nature of the substance under inquiry"--even though the petitioner had elicited testimony in the state trial court as to the nature and effects of hyoscine. 372 U.S. at 322.

In Townsend, the Supreme Court set out six circumstances in which a federal court must hear evidence on factual issues raised by state prisoners in habeas corpus proceedings. A federal court must hold an evidentiary hearing if:

- (1) the merits of the factual dispute were not resolved in the state hearing;
- (2) the state factual determination is not fully supported by the record as a whole;
- (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;
- (4) there is a substantial allegation of newly discovered evidence;

- (5) the material facts were not adequately developed at the state-court hearing; or
- (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

372 U.S. at 313.

The evidence Petitioner presented at the August 3 hearing falls within several of these categories, and within the Townsend holding. Petitioner's Exhibits 1 and 2, photographs that demonstrate that Pamela Powers' body was covered with snow and brush when the police found it, are "newly discovered" pieces of evidence that were not available at the time of the 1977 Motion to Suppress Hearing.

(Testimony of Gerald W. Crawford, Aug. 3, 1981;

Stipulation of Testimony of Roger Owens, Aug. 3, 1981)..

13/ At the hearing of August 3, Mr. Crawford testified that although he had carefully reviewed the prosecution's file, including a number of photographs, prior to the suppression hearing (pursuant to an order of the trial court), he had not seen Exhibit 1 or Exhibit 2. Respondent stipulated that if he had been called to testify Mr. Owens would have testified to the same effect. As explained by Petitioner's counsel, these photographs were discovered by Legal Intern Christopher Jackson in a box containing a large
(cont'd)

Moreover, the state courts were not presented with Exhibits 7-9 (photographs of the scene taken from the road); Exhibits 11 and 12 (reports by BCI Agents and Ruxlow); or Exhibit 16 (the 1981 deposition testimony of Mr. Ruxlow). Because these items of evidence were not presented, "the material facts were not developed at the state court hearing" and Petitioner was not afforded a "full and fair fact hearing." This is especially so in light of the fact that Exhibits 1 and 2 demonstrate that the Iowa Supreme Court relied on false evidence regarding the visibility of the body (see pp. 5-6, supra). Consequently, under parts (4) - (6) of the Townsend guidelines, this Court must consider the evidence presented at the August 3 hearing. Certainly the additional evidence presented in this case is entitled to no less consideration than the additional "truth
13/ cont'd.

number of photographs in the Polk County Courthouse. Counsel have not been able to discover any explanation for the absence of the photographs from the prosecution's file in 1977.

serum" evidence in Townsend.

While Townsend itself requires consideration of the additional evidentiary materials presented at the hearing of August 3, it should be noted that § 2254(d) also requires the same. Section 2254(d) provides a presumption of correctness to state-court factual findings unless it appears:

- (3) that the material facts were not adequately developed at the State court hearing; (or)

* * *

- (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding

Given the additional evidence discussed in the preceding paragraph, it is plain that both of these above-quoted exceptions apply to the instant case.

Consequently, § 2254(d), like Townsend, required an evidentiary hearing in this Court. 14/

14/

Although Townsend's "newly discovered evidence" category is not mentioned specifically in § 2254(3), it is subsumed under the "inadequate development of the facts" test of § 2254(3) (3).

This result is illustrated by Stumes v. Solem, 511 F.Supp. 1312 (D.S. Dak. 1981). In Stumes, the court held that police reports which had been in a federal habeas corpus petitioner's possession, but which had not been introduced at a state court evidentiary hearing, nonetheless should be considered at a federal evidentiary hearing to insure adequate development of the facts forming the basis of the petitioner's claims. See also Suggs v. LaVallee, 570 F.2d 1092 (2d Cir. 1978), cert. denied, 439 U.S. 915 (1978).

Since Townsend and § 2254(d) requires this Court to consider additional evidence, requiring Petitioner to "exhaust state remedies" by first attempting to present the additional evidence in state court would be improper. In Austin v. Swenson, 522 F.2d 168 (8th Cir. 1975), a federal habeas petitioner claimed that the State had withheld material evidence at his trial, and sought to have the evidence introduced at a federal hearing. The district court dismissed the petition without prejudice for failure to exhaust [sic] state remedies. On appeal, the Eighth Circuit vacated the dismissal and remanded the matter

to the district court with instructions to resolve the constitutional claims:

Absent a willful withholding of evidence by the defendant in the state proceeding, the requirement of exhaustion does not preclude the District Court from entertaining the issue previously raised in the state court and deciding the habeas claim upon the basis of new evidence.

522 F.2d at 170. The Court of Appeals explained that Townsend specifically contemplates a federal evidentiary hearing when significant new evidence is alleged. 522 F.2d at 170, n.6. Since Petitioner's claim that the body would have been found in the absence of his statements to law enforcement officers was considered by the Iowa Supreme Court, Petitioner need not seek further state post-conviction review of this issue simply because he has presented additional evidence in this Court.

VI. STONE V. POWELL DOES NOT PRECLUDE CONSIDERATION BY THIS COURT OF THE SUPPRESSION ISSUE.

A. While Respondent suggests that Stone v. Powell, 428 U.S. 465 (1976), should apply to the the instant case even though it does not involve a

Fourth Amendment violation, Respondent cites no authority in support of this suggestion. As Petitioner's Memorandum in Support of Petition (pp. 18-19) demonstrates, both Supreme Court decisions and lower federal court decisions have assiduously refused to expand Stone beyond its own Fourth Amendment confines. Given the fundamental differences between the Fourth Amendment, on the one hand, and the Fifth and Sixth Amendments, on the other, this is the only sensible result.

B. Even if Stone were applied to Fifth and Sixth Amendment violations, it would not preclude review by this Court in the instant case because Petitioner did not have a full and fair opportunity to litigate the suppression in the state courts. (See Memorandum in Support of Petition at 19-20). This is made especially clear by the additional evidence presented at the August 3 hearing. In reaching its decision on the suppression issue, the Iowa Supreme Court relied heavily on the two photographs of the body that were introduced at the state-court suppression hearing (Exhibits 3 and 5

in this proceeding), and on its belief (apparently based on the testimony of Agent Ruxlow) that they showed the body "as it was found." 285 N.W.2d at 262. Petitioner's Exhibits 1 and 2 -- and the deposition testimony of Agent Ruxlow -- make it clear that Exhibit 5 does not show the body as it was found. Similarly, Exhibit 1, taken together with the testimony of Officer Dawson at the state-court suppression hearing, makes it clear that Exhibit 3 also does not show the body as it was found. Consequently, the decisions of the state courts were based on a totally incorrect view of the evidence, albeit through no fault of theirs. Plainly, under these circumstances Petitioner did not have a fair and adequate opportunity to litigate the suppression issue in the state courts, and this Court therefore would not be precluded from considering the suppression issue on the merits

even if it involved the Fourth Amendment. Stone
v. Powell, supra.

Respectfully submitted,

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COST CERTIFICATE

We hereby certify that the actual cost
of printing the foregoing Appendix was the sum
of \$48.00.

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

**CRISPUS NIX, Warden of the
Iowa State Penitentiary,**

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

**On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit**

BRIEF OF AMICI CURIAE

State of Illinois, Joined by the States of Alabama, Alaska, Arizona, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming and Puerto Rico.

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QUESTION PRESENTED

Whether the doctrine of *Stone v. Powell*, precluding federal habeas corpus review of certain state convictions, should be extended to a sixth amendment case where the alleged constitutional violation did not impair the fundamental fairness of the judicial proceeding which resulted in Respondent's conviction.

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CRISPUS NIX, Warden of the
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Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICI CURIAE

State of Illinois, Joined by the States of Alabama, Alaska, Arizona, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming and Puerto Rico.

INTEREST OF AMICI CURIAE

Pursuant to United States Supreme Court Rule 36.4 the above-listed states, through their Attorneys General, offer this brief in support of the Petition for Writ of

Certiorari filed by the State of Iowa in *Nix v. Williams*, No. 82-1651 (April 7, 1983).

This case presents issues of great importance to the criminal justice system of every state. This matter involves a belated collateral federal attack upon a conviction which resulted from a full and fair state court adjudication. The litigation has been particularly burdensome because it has been virtually constant since the commission of the crime 15 years ago.

Respondent is a state prisoner who petitioned successfully for a federal writ of habeas corpus. His collateral attack challenges the conviction resulting from his second trial for the crime. This Court affirmed a grant of writ of habeas corpus which invalidated the conviction resulting from Respondent's first trial. *Brewer v. Williams*, 460 U.S. 387 (1977). In both the first and second collateral attacks, Respondent has argued that his sixth and fourteenth amendment right to counsel was violated by the admission of evidence of the murder victim's body at trial. In both instances federal courts have found that the Iowa courts erred in allowing the introduction of the evidence. Thus, this case raises issues central to the administration of criminal justice including: the appropriate scope of federal review and supervision of state criminal proceedings; the relevancy of guilt in determining the constitutionality of a conviction; the need for swift punishment and speedy restoration of criminals to a useful role in society; proper use of limited state resources allocated to criminal process; and maintenance of public confidence in the judicial system.

These issues affect the ability of every state to maintain law and order and to administer effective criminal justice programs. Thus, Amici possess a strong interest in speaking to the issues presented to the Court by this case.

STATEMENT

The Amici adopt and incorporate by reference the statement of facts set forth in Iowa's Petition for Writ of Certiorari.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW RAISES THE RECURRING QUESTION OF THE APPROPRIATE SCOPE OF THE DOCTRINE OF *STONE v. POWELL* WHICH LIMITS FEDERAL COLLATERAL REVIEW OF STATE COURT CONVICTIONS.

This case began with the brutal sexual assault and murder of a 10-year-old girl almost 15 years ago. Within 2 years of the murder, Respondent was tried and convicted of the crime and his conviction affirmed by the Iowa Supreme Court. A successful federal collateral attack, culminating in review by this Court, resulted in a second trial, conviction, and state supreme court affirmation. Respondent's second collateral federal attack has been litigated in the district and circuit courts and now comes before this Court again. The circuit court held that the introduction of evidence regarding the victim's body at the second trial violated Respondent's sixth and fourteenth amendment right to counsel because the police discovered the location of the body by talking with Respondent outside the presence of his lawyer.

In *Stone v. Powell*, 42 U.S. 465 (1976), this Court held that when a state provides an opportunity for a full and fair litigation of a fourth amendment claim, a state

prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial. This Court reasoned that in the context of federal collateral review of state convictions, the contribution of the exclusionary rule to the effectuation of the fourth amendment is minimal as compared to the substantial societal costs of applying the rule. The rationale of *Stone v. Powell* justifies preclusion of collateral review of this matter.

A.

The State Provided Respondent With An Opportunity For Full and Fair Adjudication Of His Sixth Amendment Claim.

The Iowa courts reviewed Respondent's sixth amendment claim and concluded that the evidence regarding the victim's body was admissible under the standards enunciated by this Court. The decision of the Iowa Supreme Court was appealable to this Court through direct review upon a petition for writ of certiorari. The degree of direct review afforded Respondent sufficiently protected his rights under the sixth amendment.

The alleged constitutional violation occurred at the time of arrest and prior to indictment and the commencement of trial. Respondent does not challenge the constitutional integrity of the truthfinding process which resulted in his conviction in this proceeding. Rather, Respondent contends that his sixth amendment right was violated by police conduct at the time of arrest and immediately thereafter. Respondent maintains that this alleged violation allows him a second bite at the apple, requiring federal collateral review to determine whether highly probative physical evidence discovered through the alleged violation should have been excluded at trial.

In *Rose v. Mitchell*, 443 U.S. 545 (1978), this Court explained the purpose underlying the limitation on collateral review imposed by *Stone v. Powell*. *Rose* involved allegations that the selection of the foreman of the Tennessee grand jury that indicted the defendants violated the fourteenth amendment. The State argued that the doctrine of *Stone v. Powell* precluded collateral review of the issue. This Court rejected that argument, stating that in *Stone*, "the Court made it clear that it was confining its ruling to cases involving the judicially created exclusionary rule, which had minimal utility when applied in a habeas corpus proceeding." 443 U.S. at 560. The Court further reasoned:

. . . that *Stone* rested to an extent on the Court's feeling that state courts were as capable of adjudicating Fourth Amendment claims as were federal courts. But where the allegation is that the state judiciary itself engages in discrimination in violation of the Fourteenth Amendment, there is a need to preserve independent federal habeas review of the allegation that federal rights have been transgressed.

Id. at 563.

Thus, if a state court is capable of adjudicating a fourth amendment claim as well as a federal court, it is capable also of adjudicating a fifth or sixth amendment claim as well as a federal court. A fifth or sixth amendment claim merits federal collateral review only when the alleged violation affects the integrity of the proceeding resulting in conviction.¹ Accordingly, an allegation

¹ The Court in *Rose* stated that an allegation of discrimination in the selection of a grand jury foreman, "strikes at the fundamental values of our judicial system" and thus, impairs the integrity of the truthfinding process. *Rose* at 557. In their

(Footnote continued on following page)

such as gross incompetency of counsel might necessitate collateral review. Under the reasoning of *Stone*, however, such review should not be required to assess the constitutional validity of the admission of evidence discovered through statements made outside the presence of counsel at the time of arrest.

This analysis comports with the distinctions drawn by this Court in determining whether a decision should be applied retroactively. See *Mackey v. United States*, 401 U.S. 667, 688 (1970) (Harlan, J. concurring); *Johnson v. New Jersey*, 384 U.S. 719 (1966). The focus is on the effect of the constitutional violation on the truthfinding process. Thus, while the decision defining the right to counsel in *Gideon v. Wainwright*, 472 U.S. 335 (1963), is given retroactive effect in cases under direct and collateral review, the decision defining the right of the accused to be warned of their rights in *Miranda v. Arizona*, 384 U.S. 478 (1966), is not applicable retroactively. In determining not to give *Miranda* retroactive effect, the Court reasoned that while, "*Miranda* guard[s] against the possibility of unreliable statements in every instance of in-custody interrogation, [it] encompass[es] situations in which the danger is not necessarily as great as when the accused is subjected to overt

¹ *continued*

dissents, however, Justices Stewart and Powell, joined by Justice Rehnquist, disagreed with this analysis. The dissenters argued that despite the alleged discrimination in the grand jury selection, the defendant was tried and convicted before an impartial jury and therefore, federal habeas review was unnecessary. Whatever the dispute concerning the effect of alleged discrimination in the grand jury process, there can be no question that the allegedly unconstitutional police conduct in this case did not impair the fairness of the truthfinding process. The alleged violation occurred following the arrest when police questioned the defendant outside the presence of counsel.

and obvious coercion." *Johnson v. New Jersey*, 384 U.S. at 730. Accordingly, the Court concluded that the availability of other safeguards to protect the integrity of the truthfinding process at trial eliminated the necessity for applying *Miranda* retroactively. The Court, therefore, focused on the fundamental fairness of the truthfinding process.

Similarly, in determining whether to extend *Stone v. Powell*, to fifth and sixth amendment cases, the logical focus of the analysis is on the effect of the alleged violation on the truthfinding process. The fundamental fairness of the truthfinding process is not impaired by the admission of evidence discovered through statements made outside the presence of counsel at the time of arrest. Thus, *Stone v. Powell* should be extended to preclude collateral review in a case such as this where the alleged constitutional violation does not render the truthfinding process fundamentally unfair.

B.

The Societal Costs Outweigh The Constitutional Interests Advanced By A Collateral Federal Review Of An Alleged Constitutional Violation That Does Not Impair The Fundamental Fairness Of The State Judicial Proceeding.

The system of dual review allowed in this case permits a defendant to retry his case in federal court if the outcome in state court does not satisfy him. A defendant may then contest an adverse federal decision through another round of federal review. As Justice Powell noted in *Rose v. Mitchell*:

Not only may a state claimant have a 'rerun' of his conviction in the federal courts, but also there is no limit to the number of habeas corpus petitions such a claimant may file. The jailhouse lawyers in the prisons of this country conduct a flourishing

business in repetitive habeas corpus petitions. It is not unusual to see, at this Court, a score or more petitions filed over a period of years by the same claimant.

443 U.S. at 582 (Powell, J. dissenting).

This case comes before this Court a second time after 15 years in the lower trial and appellate courts. Such lengthy and repetitive litigation imposes great costs. Finality in the criminal process is crucial to the concept of justice in an ordered society. As Justice Harlan stated in *Mackey v. United States*:

Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.

401 U.S. 667, 690 (1970) (Harlan, J. concurring) *quoting*, *Sanders v. United States*, 373 U.S. 14, 24 (1968) (Harlan, J. dissenting). *See also*, Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.R. 142 (1970); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441 (1963).

Delay in the criminal process undermines the deterrent effect of criminal law which rests on the premise that criminal behavior will result in swift and sure punishment. Protracted criminal litigation diminishes public confidence in the judicial process and discourages citizens from coming forth to assist law enforcement efforts. Further, repetitive litigation of the same issues in the same case amounts to an unnecessary drain on the

limited resources available for criminal prosecution and public defense.²

Moreover, the circuit court did not further the purpose of the exclusionary rule in holding that the evidence relating to the murder victim's body was constitutionally inadmissible. "[T]he policies behind the exclusionary rule are not absolute." *Stone v. Powell*, 428 U.S. at 488. The rule permits the exclusion of unlawfully obtained evidence, which is otherwise reliable and probative, as a deterrence against unconstitutional police conduct. *United States v. Janis*, 428 U.S. 433, 443-47 (1976); *United States v. Calandra*, 414 U.S. 338, 347-48 (1974). "As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Brewer v. Williams*, 430 U.S. 387, 422 (Burger, C.J. dissenting) quoting, *United States v. Calandra*, 430 U.S. at 348.

The sixth amendment ensures the fundamental fairness of a criminal trial and limits the risk of convicting the innocent. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 372 U.S. 45 (1932). Assuming *arguendo* a sixth amendment violation occurred, exclusion of the evidence relating to the murder victim's body would not deter future violations. The allegedly unconstitutional police conduct took place immediately after arrest and in no way affected the integrity of Respondent's trial. Further, Respondent's guilt was not in question. See, *Brewer v. Williams*, 430 U.S. at 428 (Burger,

² Prisoner petitions impose a tremendous burden on the overcrowded federal docket. In 1980, 23,607 prisoner petitions were filed in United States District Courts. See, *Annual Report of the Director of the Administrative Office of the United States Courts*, 370 (1981).

C.J. dissenting); 437 (White, J. dissenting); 441 (Blackmun, J. dissenting). "The evidence of Williams' guilt was overwhelming." *Williams v. Brewer*, 509 F.2d 227, 237 (8th Cir. 1975) (Webster, J. dissenting). Thus, application of the exclusionary rule in this case produces no deterrent effect and saddles society with the cost of allowing a guilty man to go free.

Broad federal collateral review of state court convictions raises questions concerning the appropriate scope of federal supervisory authority over state judicial systems. See, Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv.L.Rev. 1315, 1330 (1961). The overextension of federal habeas corpus ignores that the administration of criminal justice is primarily the business of the states. See, *Younger v. Harris*, 401 U.S. 37 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971). "The review by a single federal district court judge of the considered judgment of a state trial court, an intermediate appellate court, and the highest court of the State, necessarily denigrates those institutions." *Rose v. Mitchell*, 443 U.S. at 585 (Powell, J. dissenting). Thus, the extended use of federal habeas corpus conflicts with traditional principles of federalism.

The Iowa courts reviewed and decided Respondent's constitutional claim. With respect to the excluded evidence, Respondent alleged no constitutional defect in the truthfinding process which resulted in his conviction. Thus, this case did not merit federal collateral review. The burdens on society outweigh any benefit in allowing cases such as this to continue ad infinitum. "If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the questions litigants present or else it never provides an

answer at all." *Mackey v. United States*, 401 U.S. at 691 (Harlan, J. concurring.).

The conflict between the societal interests in imprisonment of the guilty and finality in criminal proceedings, and the rights of criminal defendants to have federal review of full and fair state court adjudications, merits this Court's consideration.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

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AUG 18 1983

ALEXANDER L. STEVAS,
CLERK

No. 82-1851

In The
Supreme Court of the United States

October Term, 1983

CRISPUS NIX, WARDEN OF
THE IOWA STATE PENITENTIARY,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

1. Whether the Court of Appeals exceeded its authority in reaching out to an issue not presented to or litigated in the state or federal trial courts in order to reverse a denial of habeas corpus by the District Court?

2. Whether the Court of Appeals violated the dispositional rule in *Jackson v. Denno*, 378 U. S. 368 (1964), by mandating a third new trial rather than remanding the case for a limited proceeding where reversal was based on an issue of constitutional fact which arose only on appeal and on which the State has not had a fair opportunity to present evidence?

3. Whether the Court of Appeals correctly concluded, on the record before it, that the State could not show lack of bad faith on the part of police, when, as the Iowa Supreme Court unanimously observed, "the propriety of police conduct . . . has caused the closest possible division in every appellate court which has considered the question?" *State v. Williams*, 285 N. W. 2d 248, 260 (Iowa 1979) (A. 45).

4. Whether the inevitable discovery exception to the exclusionary rule requires the State to show lack of subjective bad faith on the part of police officers?

5. Whether the rule in *Stone v. Powell*, 428 U. S. 465 (1977) should be extended to a Sixth Amendment case where highly probative and reliable physical evidence is challenged in a habeas proceeding after a full and fair opportunity to raise the issue on direct review in state courts?

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The opinion of the Court of Appeals (Pet. App. A, pp. 1-18) and the orders denying rehearing and rehearing en banc (Pet. App. B and C, pp. 19-27) are reported at 700 F.2d 1164 (8th Cir. 1983). The opinion of the federal district court (Pet. App. F., pp. 68-88) is reported at 528 F.Supp. 664 (S.D. Iowa 1981). The opinion of the Iowa Supreme Court on direct review (Pet. App. E, pp. 28-67) is reported at 285 N.W. 2d 248 (Iowa 1979).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on January 10, 1983. Timely petitions for rehearing and rehearing en banc were denied on March 15, 1983, and this petition for certiorari was filed within 90 days of that date. This Court granted certiorari on May 31, 1983, *Nix v. Williams*, 51 U.S.L.W. 3851 (U.S. May 31, 1983) (No. 82-1651). This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Amendment Six

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

United States Code, Title 28, Section 2254

(a) The Supreme Court, a Justice thereof, a circuit judge or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

This Court is already familiar with the tragic character of this 15 year old proceeding since it has been here before on certiorari. *See Brewer v. Williams*, 430 U.S. 387 (1977). For the second time, Williams' conviction of first degree murder has been set aside by federal courts exercising habeas jurisdiction.

On Christmas Eve, 1968, ten year old Pamela Powers disappeared from the Des Moines YMCA where she had been watching a wrestling match with her family. Suspicion focused on Williams, an escaped mental patient residing at the YMCA, who was seen leaving the building with a large bundle wrapped in a blanket. A boy who helped Williams open his car door testified that he viewed the bundle and "saw two legs in it and they were skinny and white." 430 U.S. at 390.

Law enforcement officials began a massive search to find Williams who eventually surrendered to police in Davenport, Iowa, some 160 miles from Des Moines. While transporting Williams back to Des Moines from Davenport, Detective Cletus Leaming obtained information from Williams about the whereabouts of the girl's body. Following Williams' directions, the police uncovered the body of Pamela Powers. Medical examination of the corpse revealed presence of acid phosphatase, a component of semen, in her body as well as pubic hairs on the victim's clothing "like" those of Williams. *See Williams v. Nix*, 700 F.2d 1164, 1168 (8th Cir. 1983), *cert. granted* 51 U.S.L.W. (U.S. May 31, 1983) (No. 82-1651) (Pet. App. 7-8).

Williams was tried and convicted of first degree murder. At trial, the State introduced the articles of clothing, evidence relating to the body's discovery and condition, and incriminating statements made to Detective Leaming

by the defendant. 430 U.S. at 394. The conviction was affirmed in a five to four decision by the Iowa Supreme Court. *State v. Williams*, 182 N.W.2d 396 (Iowa 1970). On collateral review, however, the United States District Court for the Southern District of Iowa sustained Williams' petition for a writ of habeas corpus, *Williams v. Brewer*, 375 F.Supp. 170 (S.D. Iowa 1974), and a divided panel of the United States Court of Appeals for the Eighth Circuit affirmed. 509 F.2d 227 (8th Cir. 1974).

This Court, in a five to four decision, affirmed the grant of the writ. *Brewer v. Williams*, 430 U.S. 387 (1977). The majority found that an agreement had been made between Williams' attorney and unnamed Des Moines police officers that the defendant would not be interrogated on his way back to Des Moines. 430 U.S. at 391. The Court further found that Detective Leaming, while avoiding directly questioning Williams, did nevertheless attempt to elicit information from him by making statements about the victim's need for a decent Christian burial. 430 U.S. at 399. The majority found Leaming's action violated the defendant's right to counsel guaranteed by the Sixth and Fourteenth Amendments and held that introduction of evidence discovered as a result of the interrogation was erroneous and required reversal. 430 U.S. at 406.

In an important footnote, however, the Court majority noted that while communicative evidence from the defendant could not be constitutionally admitted under any circumstance, the physical evidence, the body and its condition:

might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams. . . . In the event that a retrial is instituted, it will be for the state courts in the first instance to de-

termine whether particular items of evidence may be admitted.

430 U. S. at 441, n. 12.

The State retried Williams and sought to introduce evidence about the body under the "inevitable discovery" exception to the exclusionary rule alluded to in the above footnote. A suppression hearing was held in state court at which the defense contested the prosecution's claim that the body "would have been discovered in any event." 430 U. S. at 441, n. 12. The state trial court heard testimony regarding the law enforcement search efforts in the area where the body was eventually found. The trial court held that the body would have been discovered anyway and denied Williams' motion to suppress. *See State v. Williams*, 285 N. W. 2d 248, 260-62 (1979) (Pet. App. 46-8).

With testimony about the body and its condition admitted, Williams was again convicted of first degree murder. The Iowa Supreme Court sua sponte raised the question of whether the State must show that police did not act in bad faith for the purpose of hastening discovery of the body before it could constitutionally invoke the inevitable discovery exception. *State v. Williams*, 285 N. W. 2d 248, 260 (Iowa 1979) (Pet. App. 40-41). The Iowa Court found such a requirement, but unanimously held that on the record the State had plainly satisfied the test. The Court stated:

The issue of the propriety of the police conduct in this case, as noted earlier in this opinion, has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.

State v. Williams, 285 N. W. 2d 248, 260 (Iowa 1979) (Pet. App. 45).

Williams then launched another assault on his conviction in federal district court. He raised seven other questions not now before the Court. With respect to the application of the inevitable discovery exception, Williams limited his challenge to reargument of the defense position before the state trial court, namely, that the body would not, in fact, have been "inevitably discovered" because of the lack of thoroughness in the police search and the difficulty in observing a snow-covered body.

The District Court denied the writ, holding, *inter alia*, that the inevitable discovery exception existed and was properly invoked. *Williams v. Nix*, 528 F.Supp. 664, (S.D. Iowa 1981) (Pet. App. 75-80). The District Court opinion contained no finding on the lack-of-bad-faith issue. On appeal, the Court of Appeals for the Eighth Circuit reversed. A three-judge panel held that "the State did not satisfy its burden of proving by a preponderance of evidence that the police did not act in bad faith in obtaining Williams' statements that led them to the body." *Williams v. Nix*, 700 F.2d at 1173 (Pet. App. 17).

The State then sought rehearing both before the original panel and en banc. On March 15, the original panel denied rehearing. In a four page opinion, the court, while noting "concessions" made by the state in oral argument, also held that admission of the challenged physical evidence "would impermissibly reduce the deterrent effect of the exclusionary rule." *Williams v. Nix*, 700 F.2d at 1174 (Pet. App. 23).

On the same day, the Court of Appeals denied rehearing en banc by a four to four vote. Judge Fagg, joined by Judges Bright and Ross, filed a dissenting opinion noting

that the lack of bad faith issue "has not been placed in issue or litigated in the state and federal trial courts." *Williams v. Nix*, 700 F.2d at 1164 (Pet. App. 20). He noted that the State and the defense both viewed the inevitable discovery exception at trial as having "only one prong, inevitable discovery of the body, and that was the issue presented to the trial judge." *Id.* Only later did the Iowa Supreme Court inject the second prong, good faith, into the case. Rather than remand the case "to the trial court for a limited evidentiary hearing," the Iowa Supreme Court "ruled as a matter of law that Officer Leaming acted in good faith." *Id.* at 1176 (Pet. App. 21). The dissent thus argued, at a minimum, that some kind of limited remand should be considered. *Id.*

This Court granted certiorari to review the ruling and opinion of the Court of Appeals on May 31, 1983.

SUMMARY OF ARGUMENT

In this case, the Court of Appeals committed errors of both procedure and substance. In setting aside Respondent's second conviction, the Court did not expressly embrace an inevitable discovery exception to the exclusionary rule, but found that if such an exception existed, the State must show absence of bad faith before it could be invoked. The Court then concluded as a matter of law that the Petitioner had failed to make the necessary showing on the issue. This conclusion was reached notwithstanding the fact that the issue was not litigated in either the state or federal trial courts. Finally, the Court declined to extend the doctrine of *Stone v. Powell*, 428 U.S. 465 (1976), to the case notwithstanding Respondent's attempt to relitigate admissibility of highly probative and reliable, physical evidence in a habeas corpus proceeding.

Petitioner believes that the Court erred in finding that a showing of absence of bad faith is required before the State can invoke the inevitable discovery exception to the exclusionary rule. This exception, which has been adopted in one form or another by all the federal circuits, has not generally been held to require absence of bad faith. In independent source rule cases, no showing of absence of bad faith is required since the inquiry is limited to causation. Similarly, a showing of absence of bad faith should not be required to invoke the inevitable discovery exception, where the only issue is whether the challenged evidence in fact would have been discovered by lawful means.

Even if absence of bad faith is required, Petitioner believes the Court of Appeals erred in its treatment of the issue. Petitioner believes that any limitation on inevitable discovery based on the character of police conduct should apply only where knowing constitutional violations are so egregious that the spectacle of continued criminal prosecution of the accused cannot be tolerated. This standard is appropriate because allowing a collateral mistake to poison even fruit that would have inevitably been discovered by lawful means often amounts to immunity from prosecution notwithstanding the reliability of the evidence in question.

In any case, Petitioner has made a showing of absence of bad faith even if more exacting judicial scrutiny similar to that employed under 42 U. S. C. § 1983 is appropriate. The record of Respondent's first trial shows that Detective Leaming attempted to tailor his conduct to what he thought were constitutional requirements. He read Respondent *Miranda* rights, did not question him directly,

and freely volunteered his story about the so-called Christian burial speech in open court. While Leaming committed constitutional error, it does not appear to have been in bad faith.

It is also clear that Leaming cannot reasonably be charged with knowing that his conduct was unconstitutional. The rule in *Massiah v. United States*, 377 U.S. 201 (1964), had not yet been extended to situations where the accused actually knows he is talking to a police officer, and the definition of interrogation under *Miranda* had not been authoritatively explored. Indeed, the closeness of the issue in this Court conclusively demonstrates that Leaming could not have known his conduct was unconstitutional. *Brewer v. Williams*, 430 U.S. 387 (1977).

The Court of Appeals disposition of the case reveals further error. Examination of the transcript of the hearing on Respondent's motions to suppress in state court shows that the absence of bad faith question was not litigated at trial. The absence of appropriate pleadings by Respondent and the lack of findings by the Federal District Court on the issue also confirms that the question was not actually litigated in federal court. Under the circumstances, there is serious question as to whether the Court of Appeals should have considered the issue at all, let alone deny the State an opportunity to make an evidentiary showing on the question.

Finally, the Court erred in not extending the doctrine in *Stone v. Powell*, 428 U.S. 465 (1976), to the facts presented here. The entire rationale of *Stone v. Powell* applies with full force to this Sixth Amendment case where the inevitable discovery exception is invoked to allow admission of highly probative and reliable physical evidence. Police will be adequately deterred by the possibility of

losing convictions on direct appeal. The marginal deterrence value of relitigating the issue in habeas proceedings is minimal. Under the circumstances, the interests in finality and repose, particularly where admission of evidence enhances the integrity and reliability of the factfinding process, overrides all other considerations.

ARGUMENT

I. Where the record shows that highly probative and reliable physical evidence discovered as a result of illegal law enforcement action imminently would have been discovered by lawful independent investigative activity already in progress, the evidence is admissible through the inevitable discovery exception to the exclusionary rule without examination of the subjective state of mind of police officers who engaged in the unlawful conduct.

In reversing the rulings of the trial court, the Iowa Supreme Court, and the Federal District Court in this case, the Court of Appeals held that even conceding arguendo the existence of an inevitable discovery exception to the exclusionary rule, the State must affirmatively demonstrate the absence of bad faith on the part of the police officers found to have engaged in illegal conduct.¹ In Petitioner's view, not only is the inevitable discovery doctrine a constitutionally permissible exception to the exclusionary rule but, under the facts and circumstances presented here, it may be invoked without a showing of lack of bad faith by police officers.

A. As unanimously developed in the federal circuits, the inevitable discovery exception is consistent with this Court's well-established approach to the exclusionary rule and has strong policy footing.

¹*Williams v. Nix*, 700 F.2d 1164, 1173 (8th Cir. 1983) (Pet. App. at 17).

This Court, notwithstanding a suggestive footnote in *Brewer v. Williams*, 430 U. S. 387 (1977), has not yet had occasion to employ expressly an inevitable discovery exception to the exclusionary rule.² All of the Courts of Appeals, however, have addressed the issue, and all have eventually embraced, in one form or another, an inevitable discovery doctrine. Influenced by this Court's express adoption of "attenuation" and "independent source" exceptions to the exclusionary rule, see *Wong Sun v. United States*, 371 U. S. 471, 487-88 (1963) (attenuation); *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392 (1920) (independent source), these cases stand for the proposition that where evidence would have been discovered in any event by legitimate law enforcement activity, the interest in presenting the trier of fact with reliable evidence outweighs whatever deterrence might be accomplished by exclusion.³ This cautious approach to the application of the exclusionary rule is consistent with this Court's general direction that the rule should be carefully "restricted to those areas where its remedial objectives are thought to be most efficaciously served." *United States v. Calandra*, 414 U. S. 338, 348 (1974).

²*Brewer v. Williams*, 430 U. S. 387, 406 n. 12 (1977).

³See *Wayne v. United States*, 318 F. 2d 205, 209 (D. C. Cir.), cert. denied, 375 U. S. 860 (1963); *United States v. Bienvenue*, 632 F. 2d 910, 914 (1st Cir. 1980); *United States v. Fisher*, 700 F. 2d 780, 784 (2d Cir. 1983); *Government of the Virgin Islands v. Gereau*, 502 F. 2d 914, 927-928 (3d Cir. 1974), cert. denied, 420 U. S. 909 (1975); *United States v. Seohnlein*, 423 F. 2d 1051, 1053 (4th Cir.), cert. denied, 399 U. S. 913 (1970); *United States v. Brookins*, 614 F. 2d 1037, 1042, 1044 (5th Cir. 1980); *Papp v. Jago*, 656 F. 2d 221, 222 (6th Cir. 1981); *United States ex rel. Owens v. Twomey*, 508 F. 2d 858, 865-866 (7th Cir. 1974); *United States v. Apker*, 705 F. 2d 293, 306-307 (8th Cir. 1983); *United States v. Schmidt*, 573 F. 2d 1057, 1065-1066 n. 9 (9th Cir.), cert. denied, 439 U. S. 881 (1978); *United States v. Romero*, 692 F. 2d 699, 704 (10th Cir. 1982); *United States v. Roper*, 681 F. 2d 1354, 1358 (11th Cir. 1982).

Close examination of the inevitable discovery cases reveals that there are three separate and distinct factual contexts in which the doctrine has been applied. The cases may be divided into those involving "independent inevitable discovery," "a hypothetical independent source," and "dependent inevitable discovery." This case presents "independent inevitable discovery," by far the strongest factual context in which to repulse any invasion of the factfinding process by costly extension of the exclusionary rule.

When "independent inevitable discovery" is utilized, lawfully obtained leads totally independent of collateral illegal conduct are in fact being aggressively pursued by law enforcement. In this narrow class of inevitable discovery cases, courts are not asked to speculate about whether police would have actually launched the legitimate investigative efforts because the record shows that such activity had in fact been initiated. In the "independent inevitable discovery" context, separate and distinct lines of police activity are racing toward discovery of evidence related to the crime. If the legal techniques uncover the evidence before the unlawful investigative efforts, the independent source rule applies. If, on the other hand, the unlawful efforts reach the evidence first inevitable discovery is applicable upon a showing by a preponderance of evidence that law enforcement would have discovered the underlying evidence in any event through lawful efforts.⁴

⁴See e.g., *United States v. Romero*, 692 F.2d 699, 703-04 (10th Cir. 1982) (illegal *Terry*-type search occurs just prior to independent determination of probable cause to arrest subject and conduct search incident to arrest); *United States v. Brooks*, 614 F.2d 1037, 1044-49 (5th Cir. 1980) (identification of accomplice in crime imminent through lawful means notwithstanding illegal interrogation).

This case presents a solid example of "independent inevitable discovery." Two unrelated lines of investigation were being pursued simultaneously by Iowa law enforcement officials. The discovery of articles of clothing at a rest area along Interstate 80 at Grinnell, 60 miles from Des Moines, caused police to theorize that the body may have been disposed of along Interstate 80 somewhere between Grinnell and Des Moines. Transcript of Motions to Suppress Evidence at 35-36 (Joint App. at 33). Detective Ruxlow, directing 200 volunteers in a thorough, painstaking search in central Iowa, was on the verge of lawfully discovering the body of Pamela Powers. Tr. at 34 (Joint App. 31). The Ruxlow group had scoured the roadsides and culverts approximately seven miles each side of Interstate 80 for a distance of over forty miles, and had reached a spot only two and a half miles from the culvert where the girl's body rested. Tr. at 35-43 (Joint App. 32-36). While this lawful and exhaustive search was underway, Detective Leaming engaged in the now famous conversation with Williams which was later determined by this Court to be unconstitutional. At a time when discovery of Pamela Powers' body by Ruxlow and his volunteers was imminent, Williams agreed to lead officials to the body. The legal search, which the trial court found would have otherwise continued, was terminated.³

³According to the state trial court, "the searchers would have arrived at the site of the body within a short time of its actual finding, had they continued the search after dark. . . . Had the searchers stopped due to the snow and the dark the next day was a Friday and a weekend was upcoming—the search would clearly have been taken up again where it left off, given the extreme circumstances of the case and the body would have been found in short order." See *Ruling on Motions to Suppress* at 5 (Joint App. at 86). Moreover, with re-

Where two independent lines of inquiry are converging on the same evidence, the so-called inevitable discovery exception represents a conventional variant of the well-accepted independent source rule. In this context, the inevitable discovery exception merely stands for the common sense principle that vagaries of timing of discovery will not defeat introduction of evidence that would otherwise clearly be admissible under the independent source rule announced in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920), and its progeny.

In a small minority of cases, the doctrine of inevitable discovery has been criticized.⁶ Where the approach has been questioned, however, it has been when the prosecution asks the court to either (1) engage in far reaching speculation as to what kind of investigation law enforcement officials *might* have launched in the future had the illegality not occurred, or (2) to reconstruct a single, continuous illegal course of conduct in a legal fashion. In these cases, no independent investigative activity is literally on the verge of discovery of the challenged evidence.

The first group of occasionally criticized cases apply what might be called a "hypothetical independent source" approach to inevitable discovery. Again, no independent inquiry has actually been undertaken which may sever the linkage between the illegal conduct and the tainted evidence in these cases. Instead, the court is forced to

(Continued from previous page)

spect to the testimony of Detective Ruxlow, the Court noted that he "impressed the Court as an intelligent and organized man with experience in the area of searches." *Id.* at 3 (Joint App. at 85).

⁶See, e.g., *United States v. Villareal*, 565 F. 2d 932, 941-42 (5th Cir. 1978) (Wisdom, J., dissenting); *United States v. Griffin*, 502 F. 2d 959 (6th Cir. 1974); *United States v. Paroutian*, 299 F. 2d 486, 489 (2d Cir. 1962).

project how law enforcement would have behaved in the future had the unlawful conduct not occurred.⁷ While the vast majority of "hypothetical independent source" cases project routine police investigative techniques in an unquestionable fashion,⁸ the approach, if improperly handled, can involve rather extreme speculation. In one unusual case, it was assumed that law enforcement officers would have painstakingly searched through thousands of consignment documents in the hands of almost a hundred import brokers in the area of an alleged crime to uncover the same evidence seized in an unlawful search.⁹

In the case at bar, however, the State has not asked the courts to engage in undisciplined soothsaying. There is no question as to what kind of law enforcement investigation "might" have been launched in the future had the underlying illegality not occurred. Indeed, it is undisputed that a massive search for Pamela Powers involving hundreds of persons was in fact initiated and was progressing directly toward the area where Pamela Powers' body was ultimately found. Criticism of the more ex-

⁷See *United States v. Crews*, 445 U. S. 463, 475 n. 22 (1980).

⁸See, e.g., *United States v. Wilson*, 671 F. 2d 1291, 1293-94 (11th Cir. 1982) (letter threatening President sent to the White House would have inevitably been discovered and forwarded to appropriate officials notwithstanding examination of outgoing mail); *United States v. Bienvenue*, 632 F. 2d 910, 914 (1st Cir. 1980) (evidence of travel to Columbia by husband of wife arrested in Florida for conspiracy to import cocaine that was seized in unlawful search of home would have been discovered through routine police procedures because officers knew the husband had previously travelled to Columbia through an unnamed travel agency in Manchester prior to illegal search); *United States ex rel. Owens v. Twomey*, 508 F. 2d 858, 866 (7th Cir. 1974) (key witness whose name and address were known to police prior to illegal search would have been discovered anyway through routine procedures even though she was actually found at a work address unlawfully obtained from defendant).

⁹*United States v. Falley*, 489 F. 2d 33, 40 (2d Cir. 1973).

treme "hypothetical independent source" cases as unduly speculative application of inevitable discovery has no force here where independent investigative techniques were actually underway which the trial court found would have discovered the challenged evidence had the illegal conduct not occurred.¹⁰

Resort to inevitable discovery theory also sometimes occurs in an effort to engage in after the fact repair of unlawful conduct. Since no actual or even hypothetical independent avenue of discovery is present, these cases may be labeled "dependent inevitable discovery." Admission of the evidence concededly causally depends on conduct found to be illegal. The court, however, is asked to undo the transaction and reconstruct it in a legal fashion. For instance, in one case, the government sought to allow admission of evidence discovered as a result of an unlawful warrantless search on the ground that agents planned to obtain a warrant for which they had adequate probable cause. Since the agents could have gotten a warrant, the court was asked to treat the transaction as if they had in fact obtained a warrant.¹¹

¹⁰This case also presents a comparatively nonspeculative "hypothetical independent source" alternate ground for admission of the evidence. Williams' first attorney, McKnight, had told him that he would ultimately have to lead police to the body. Williams, in his initial statements to Leaming, told him that he would tell everything once he saw his lawyer in Des Moines. This set of circumstances led Justice Marshall to conclude that Leaming sought to avoid that result, which could cloak the fact that Williams provided the information about the girl's whereabouts in attorney-client privilege. See *Brewer v. Williams*, 430 U. S. at 408 (Marshall J., concurring). It could thus be concluded that Williams would have provided information with respect to the body to McKnight, who would have told police. This alternative theory of inevitable discovery was recognized by the state trial court. See *Ruling on Motions to Suppress* at 6 (Joint App. 87-88).

¹¹*United States v. Griffin*, 502 F. 2d 959 (6th Cir. 1974).

While the federal courts have been most receptive to other applications of inevitable discovery, they have been allergic to the constitutional salvage efforts in the dependent inevitable discovery cases. If inevitable discovery may be invoked to admit evidence illegally obtained on the ground that a warrant could have in fact been obtained, the requirement to present probable cause to a magistrate *first* would be substantially eviscerated. Indeed, in strong cases, a warrant simply would not be required.¹²

In the present case, however, no evisceration of constitutional requirements will occur. Here, an independent line of inquiry is converging on the evidence. Moreover, all evidence that was obtained solely as a result of the illegal activity—namely, evidence showing that Williams in fact led officers to the body and incriminating statements made by Williams—has been suppressed. Thus, the deterrent function of the exclusionary rule has been fully maintained in this case.¹³

In conclusion, the inevitable discovery exception to the exclusionary rule as applied in this case is entirely

¹²As the Court emphasized in *United States v. Griffin*, "The assertion by police . . . that the discovery was 'inevitable' because they planned to get a search warrant and had sent an officer on such a mission, would as a practical matter be beyond judicial review. Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment." 502 F. 2d at 961; see also *United States v. Paroutian*, 299 F. 2d 486, 488 (2d Cir. 1962).

¹³Indeed, in this case, the state trial court judge rejected an effort by the prosecution to introduce evidence obtained through a warrantless search of Williams' room at the YMCA on December 24, 1968. Although a warrant was obtained the next day, Judge Denato refused to admit the evidence. According to the court, "the fact that probable cause was present all along and would have been likewise adequate on 12-24-68 cannot be held to validate the reentry with a search warrant after the prior, warrantless search was conducted." See *Ruling on Motions to Suppress* at 9-10 (Joint App. at 90-91).

consistent with this Court's precedents. *Nardone v. United States*, 308 U.S. 338 (1939); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). No extraordinary speculation as to what might have occurred is required, and no substantive requirement of criminal law is defeated by the application here. Moreover, since substantial evidence has already been suppressed, the deterrence purposes of the exclusionary rule have been fully served. Under the facts and circumstances presented here, inevitable discovery is a sound doctrine that properly balances the need to deter unlawful police conduct against the requirements of effective law enforcement.¹⁴

B. A showing of lack of bad faith on the part of police officers is not required to invoke the inevitable discovery exception to the exclusionary rule.

The vast majority of inevitable discovery cases contain no discussion of the question of whether police offi-

¹⁴Petitioner recognizes the view that the exclusionary rule enables "the judiciary to avoid the taint of partnership in official lawlessness" and assures the people "that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." *United States v. Calandra*, 414 U.S. 338, 357-58 (1974) (Brennan, J., dissenting). The Petitioner believes, however, that exclusion of highly probative and reliable evidence that police demonstrably would have discovered anyway through lawful means fifteen years after a notorious crime would more seriously undermine popular trust in government than would its admission. See Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 737-38 (1970). While preservation of judicial integrity may have a limited role in determining whether the exclusionary rule should apply in a particular context, *Stone v. Powell*, 428 U.S. at 485, it has no applicability under the facts here. Cf. *United States v. Crews*, 445 U.S. 463 (1980) (exclusionary rule does not require suppression of identification notwithstanding actual use of illegally obtained photograph).

cers acted with an absence of bad faith.¹⁵ Indeed, a number of cases utilize inevitable discovery in the context of clearly illegal police conduct, at least raising the implication that the question is irrelevant.¹⁶ The Petitioner believes that where the body of a murder victim—highly probative and reliable evidence relating to the guilt or innocence of the accused—would have been imminently discovered by legitimate law enforcement activity independent of illegal conduct, the State should not be required to demonstrate absence of bad faith. Under these circumstances, the only question is the causal con-

¹⁵The footnote in *Brewer v. Williams*, which discusses inevitable discovery contains no mention of the issue, nor is absence of bad faith considered in *Killough v. United States*, 119 U. S. App. D. C. 10, 336 F. 2d 929 (1964), the case cited by this Court in the note. 430 U. S. at 406 n. 12.

¹⁶*United States v. Romero*, 692 F. 2d 699, 703 (10th Cir. 1982) (agent testified that he knew object in suspect's pants was not weapon, but seized it anyway in direct violation of *Sibron v. New York*, 392 U. S. 40, 65-66 (1968)); *United States v. Kandik*, 633 F. 2d 1334, 1336 (9th Cir. 1980) (inevitable discovery invoked notwithstanding use of information obtained in plea bargaining session in clear violation of Fed. R. Crim. P. 11(e)(6)); *United States v. Bienvenue*, 632 F. 2d 910, 914 (1st Cir. 1980) (inevitable discovery applied where warrantless search of defendant's apartment without exigent circumstances); *United States v. Brookins*, 614 F. 2d 1037, 1044-49 (5th Cir. 1980) (accused, in custody for 72 hours without presentment to magistrate, told that law enforcement were "not interested in you" and comments would be "off the record"); *United States v. De Marce*, 513 F. 2d 755, 758 (8th Cir. 1975) (inevitable discovery invoked notwithstanding 80-hour delay in presenting juvenile suspect to magistrate after arrest); *United States v. Cole*, 463 F. 2d 163, 174 (2d Cir. 1972) (inevitable discovery applied where unauthorized wiretap deserves the "sharpest condemnation"); see also *United States v. Allen*, 436 A. 2d 1303, 1309 (D. C. App. 1981) (inevitable discovery applies notwithstanding clear violation of *Dunaway*); *Martin v. State*, 433 A. 2d 1025, 1031 (Del. 1980) (inevitable discovery applied even though state concedes unconstitutionality of search); *State v. Allies*, 606 P. 2d 1043, 1052-53 (Mont. 1979) (heavy coercion including truth serum and "Mutt and Jeff" approach to interrogation, yet inevitable discovery applies).

nection between the body and the underlying constitutional infraction can be severed through application of the inevitable discovery doctrine.¹⁷

This Court has not required a showing of absence of bad faith in applying the independent source rule. Indeed, as with the inevitable discovery cases, the independent source rule is often invoked where there are rather clear constitutional violations that tend to negate the proposition that police officers acted in good faith.¹⁸ For instance, in *United States v. Crews*, 445 U. S. 463 (1980), the suspect was arrested without probable cause, ostensibly because he was a suspected truant, apparently in or-

¹⁷Because the absence of bad faith issue was not subject to evidentiary proceedings in state or federal trial courts and received only perfunctory mention in briefs before the Court of Appeals, see Joint Appendix at 181-87, counsel for the state was surprised when the issue emerged from the bench at oral argument. In the petition for rehearing, Petitioner urged consideration of whether absence of bad faith is required notwithstanding commentary of counsel at oral argument that the Court construed as concessions on the issue. In denying rehearing, the Court of Appeals, while noting "concessions" of counsel, proceeded in the alternative to hold, on the merits, that a showing of absence of bad faith is required in order to invoke the inevitable discovery exception to the exclusionary rule. *Williams v. Nix*, 700 F.2d at 1174. Since the Court of Appeals ruled on the issue in denying rehearing, the Petitioner believes the issue is properly before the Court.

¹⁸Respondent appears to rely heavily on *Brown v. Illinois*, 422 U. S. 590 (1975), for the proposition that a showing of absence of bad faith is required here. See Respondent's Opposition to Certiorari at 7-12. But *Brown* is not a case involving inevitable discovery or its close legal relative, the independent source rule. Rather, *Brown* involves the analytically distinct attenuation exception to the exclusionary rule. Since there is no real or hypothetical independent route to the discovery of evidence in attenuation cases, "flagrancy" of police conduct is a factor to be considered in determining whether the connection between challenged evidence and illegality is sufficiently remote to allow its admission. *Brown* has no application where an independent source severs the "but for" relationship between the underlying illegality and the challenged evidence.

der to obtain a photograph for use in an assault and robbery investigation. 445 U.S. at 463. This Court, however, did not consider the bad faith issue in applying the independent source rule to a subsequent in-court identification of the suspect by the victim.¹⁹

Similarly, in cases where false information is contained in affidavits filed in support of a search warrant, the fact that the material may have been submitted in bad faith is not dispositive. In *Franks v. Delaware*, 438 U.S. 154 (1978), this Court held that where sufficient content in a warrant affidavit supports probable cause after false material is disregarded, the warrant is valid. 438 U.S. at 172. The tainted portions of the warrant do not bleach the truthful material when independently considered. See also *Kastigar v. United States*, 406 U.S. 442, 460 (1972) (only inquiry in severing evidence from prosecutorial guarantee of immunity is causal in nature).

Any rule to the contrary would have serious consequences for the administration of criminal justice. If a showing of absence of bad faith were required every time the independent source rule or inevitable discovery were raised, criminal proceedings could turn on the elusive state of mind of law enforcement officers rather than on the guilt or innocence of the accused.²⁰ The courts would continually be grappling with such questions as how much constitutional law the officers knew or should have known at the time of the alleged infraction. As has been observed in a similar context, "Sending state and federal courts

¹⁹The Court in *Crews* discusses motivation for the arrest in a brief footnote that does not directly consider the good faith issue. 445 U.S. at 468 n. 5.

²⁰Leaming's statements and actions have been subject to painstaking scrutiny even in law review commentary. See Kamisar, *Forward: Brewer v. Williams—A Hard Look at a Discomforting Record*, 66 Geo. L. J. 201 (1977).

into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J. dissenting); *United States v. Peltier*, 422 U.S. 531, 560-61 (1975) (Brennan, J., dissenting). Certainly neither constitutional nor prudential considerations require such an awkward result.

Limiting the inquiry in inevitable discovery and independent source contexts to causation does not eviscerate the exclusionary rule. The State is still required to show what amounts to an "independent, legitimate source" for disputed evidence, a requirement which this Court, in a similar context, has characterized as "a substantial protection" against abuse. See *Kastigar v. United States*, 406 U.S. 441, 461 (1972) (use immunity). Any evidence that has been obtained by illegal means which would not inevitably or independently have been discovered is still subject to its bite. Indeed, in this very case, the prosecution has already been deprived by operation of the exclusionary rule of evidence of the most probative character, namely, incriminating statements by Williams to Leaming, and the fact that Williams led police to the body.¹¹

¹¹For other inevitable discovery cases where evidence only discoverable through illegal conduct is suppressed, see *Papp v. Jago*, 656 F.2d 221 (6th Cir. 1981) (confession obtained in violation of *Miranda* excluded, but body of victim introduced as corpus delicti under inevitable discovery); *United States v. Kandik*, 633 F.2d 1334 (9th Cir. 1980) (plates and counterfeiting paraphernalia suppressed, though testimony about operation from co-conspirators admitted); *United States v. Brookins*, 614 F.2d 1037 (5th Cir. 1980) (results of "consent search" and incriminating statements obtained after 72 hour detention without presentment to a magistrate suppressed, but name of associate in crime, obtained while accused illegally restrained admitted on ground that it would have been discovered anyway); *United States v. De Marce*, 513 F.2d 755 (8th Cir. 1975) (confession result of 80-hour detention without presentment to

Exclusion of this important evidence amply satisfies the legitimate appetite of the exclusionary rule. As this Court recognized in *Michigan v. Tucker*, 417 U.S. 433 (1974), deterrence is not significantly augmented once evidence directly obtained as a result of unlawful conduct has been suppressed. 417 U.S. at 448.

To allow police misconduct to taint the inevitable fruit of legitimate law enforcement activity in the interest of obtaining another ounce of dubious deterrence in the name of an expanded exclusionary rule would be far too Carthaginian on the prosecution. Suppression of evidence relating to the body of Pamela Powers and its condition would run afoul of this Court's frequent admonition that the exclusionary rule should be applied sparingly with due regard for society's interest in effective law enforcement. See *Stone v. Powell*, 428 U.S. at 488-89; *Michigan v. Tucker*, 417 U.S. at 446; *United States v. Calandra*, 414 U.S. at 348. Even a bad faith error by a police officer, reprehensible as it may be, should not immunize a defendant from prosecution for a heinous crime. This Court's observation that enforcement of criminal law is "not a game to be checkmated by error," *McGuire v. United*

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magistrate suppressed, but .22 caliber gun admitted on inevitable discovery theory); *Government of Virgin Island v. Gereau*, 502 F.2d 914 (3d Cir. 1974) (incriminating statement regarding gun given by defendant pursuant to unlawful arrest suppressed, but gun found in vicinity of massive search in progress admitted on inevitable discovery theory); *United States v. Cole*, 463 F.2d 163 (2d Cir. 1972) and *United States v. Shipani*, 414 F.2d 1262 (2d Cir. 1969) (evidence that resulted only from illegal wiretap not suppressed, though other evidence that would have been discovered admitted under inevitable discovery); *Wayne v. United States*, 318 F.2d 205 (D.C. Cir. 1962) (medication, its container, and cash in search for person allegedly killed by illegal abortion suppressed, but gun found in vicinity of massive search in progress admitted on inevitable discovery theory).

States, 273 U. S. 95, 99 (1927), is applicable here regardless of the character of the unconstitutional conduct.²²

II. Even if a showing of absence of bad faith is required before the inevitable discovery exception to the exclusionary rule may be invoked, the Court of Appeals erred in finding the State failed to show lack of bad faith.

Conceding *arguendo* that the State must show an absence of bad faith before the inevitable discovery exception to the exclusionary rule may be invoked, the Petitioner believes that the Court of Appeals committed error when it held that the State failed to meet its burden on the issue. In Petitioner's view, the Court of Appeals applied an incorrect legal standard to undisputed facts in this case. In the alternative, the Petitioner believes the Court erred in finding the State could not show absence of bad faith when the question has not been the subject of an evidentiary hearing in state or federal court.

A. The Petitioner met its burden in demonstrating that police officers acted without bad faith.

After scouring this Court's previous opinion in *Brewer v. Williams*, the Court of Appeals concluded that the State could not show that Detective Leaming acted with an absence of bad faith. The Court emphasized this Court's prior conclusions that Leaming's conduct was undertaken "deliberately," "designedly," and "purposely." 430 U. S. at 399.²³ This is no doubt true in a general sense given

²²The exclusionary rule, of course, is not the only available mechanism to deter bad faith conduct by police. An officer who engages in egregious constitutional violations is subject to internal police sanctions. In addition, an officer acting in bad faith is subject to liability under 42 U. S. C. § 1983 even if the plaintiff pleads guilty on the underlying criminal charge. See *Haring v. Prosise*, 51 U. S. L. W. 4736 (U. S. June 13, 1983) (No. 81-2169).

²³*Nix v. Williams*, 700 F.2d 1164, 1171 (8th Cir. 1983).

Leaming's testimony in the first trial suppression hearing.²⁴

But the question here is not whether Leaming intended his statement to elicit a response from the accused. Even if a showing of absence of bad faith is required in order to invoke the inevitable discovery exception to the exclusionary rule, the fact that Leaming generally intended to further the investigation is irrelevant.²⁵ In Petitioner's view, any limitation on inevitable discovery based on character of police conduct, should apply only where constitutional violations are so egregious that the spectacle of continued prosecution of the accused simply cannot be tolerated. *Rochin v. California*, 342 U.S. 165 (1952).

Application of this admittedly stringent standard in this case to allow admission of the challenged evidence would not require this Court to harken back to less celebrated days of American criminal justice. Rather, the approach would simply recognize the blunt facts of this case: (1) the body has been discovered, (2) the body's physical condition demonstrates without peradventure that a brutal murder has occurred, (3) the underlying constitutional infraction that led law enforcement officers to the body is technical in nature, (4) law enforcement has al-

²⁴See *Brewer v. Williams*, 430 U.S. at 399.

²⁵In 42 U.S.C. § 1983 context, this Court has expressly rejected the proposition that intentional conduct that violates constitutional rights is *per se* a showing of bad faith. See *Baker v. McCollen*, 443 U.S. 137 (1979) (officials not liable for eight-day incarceration of suspect's brother resulting from misidentification). *Baker*, of course, involves mistake of fact, rather than of law, but this is a distinction without a difference considering the need to allow breathing room for public officials is equally required in either context.

ready paid a stiff price for the unlawful police conduct through traditional operations of the exclusionary rule, and (5) since the body would have been discovered in any event by lawful means, no insult to the integrity of the criminal justice system occurs through admission of evidence relating to the body.

Respondent looks to cases construing liability of public officials under 42 U.S.C. § 1983 for guidance on the issue of proper standard regarding any absence of bad faith requirement that might somehow be grafted on to the inevitable discovery doctrine. *See* Respondent's Opposition to Certiorari at 14. Even though these cases generally do not directly implicate the strong public interest in effective criminal prosecution, this Court has repeatedly expressed the concern that too harsh a review of the actions of public officials could deter their willingness to execute their responsibilities with decisiveness and without undue timidity. *Wood v. Strickland*, 420 U.S. 308, 321 (1974); *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). As a result, this Court has held in the section 1983 context that public officials do not act in bad faith unless it can be shown that "the constitutional right allegedly infringed by them was *clearly* established at the time of their challenged conduct, if they knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm." *Procunier v. Navarette*, 434 U.S. 555, 563 (1977) (emphasis supplied).

The policy concerns expressed in *Scheuer v. Rhodes*, *Wood v. Strickland* and *Procunier v. Navarette* have force in the law enforcement context where rapid action is often critical to success. While it could be argued that some mechanism is necessary to deter police from unlawful

conduct, law enforcement officers are surely entitled to as much breathing room in the execution of their duties as are school administrators or prison officials.

Even applying Respondent's section 1983 test in a subjective fashion to the present case, it seems clear that the State has met whatever burden it might have had to show absence of bad faith. Plainly, any suggestion that Leaming actually knew his conduct was unconstitutional swims against heavy current. If Leaming had enough sophisticated legal knowledge actually to know in his own mind what this highly divided court would decide ten years after the fact, he surely would have also known that he was running a high risk of causing extremely important evidence to be excluded as "fruit of the poisonous tree" and that the entire prosecution of Williams could be jeopardized. Leaming would be an odd fellow indeed to have such a state of mind.

The record of Respondent's first trial, which Petitioner asks this Court to judicially notice, clearly indicates that Leaming had some sensitivity to the constitutional rights of the accused. Before departing on the trip from Davenport to Des Moines, Leaming read Williams his *Miranda* rights, stating, "I want you to remember this because we'll be visiting between here and Des Moines." *Brewer v. Williams*, 430 U. S. at 392. Apparently trying to comply with the *Miranda* decision, Leaming was careful not to directly ask Williams questions. As Leaming told the accused, "I do not want you to answer me. I do not want you to discuss it further." See 430 U. S. at 393. While Leaming may later have been judged by a narrow majority in this Court to have crossed the constitutional line, evidence adduced at Respondent's first trial demon-

strates a desire on the part of Leaming to tailor his conduct to comply with what he thought were constitutional requirements.²⁶

Leaming was also remarkably forthcoming at the suppression hearing at the first trial with respect to what occurred in the car between Davenport and Des Moines. Defense counsel did not have to pry testimony regarding the Christian burial speech out of a reluctant witness. He volunteered it in response to a general question. The transcript of the hearing²⁷ reads:

Q. (By Williams' attorney) You didn't ask Williams any questions?

A. No sir, I told him some things.

Q. You told him some things?

²⁶Petitioner has no desire to relitigate *Brewer v. Williams*. However, the assertion by Respondent that Leaming himself broke an agreement that he made with defense counsel, see Respondent's Opposition to Certiorari at 2, is without foundation in the record of either of Williams' trials. As Professor Kamisar notes, police overheard Williams' attorney, McKnight, tell Williams on the phone that he would not be questioned, and should not reveal anything, until he arrived in Des Moines. Apparently both the trial court and the federal district court concluded that by their *silence*, the Des Moines police agreed to "go along" with McKnight on this matter. Professor Kamisar rightly concludes that "there is no indication in the record that after McKnight concluded his phone conversation with Williams *nothing* was said by McKnight or by the Des Moines police about not questioning Williams on the return trip. The record does not show an explicit agreement, or even that McKnight directly instructed Chief Nichols or Captain Leaming that Williams was not to be questioned on the return trip." When Kelly, Williams' Davenport lawyer, expressed his view of arrangements for travel, Leaming replied, "That isn't quite the way I understand it." See Kamisar, *Foreward: Brewer v. Williams—A Hard Look at a Discomforting Record*, 66 Geo. L. J. 209, 212-13 nn. 23-24 (1977), citing *Brewer v. Williams*, 430 U.S. 387 (1978), Joint App. at 38-41, 107.

²⁷See *Brewer v. Williams*, 430 U.S. 387 (1978), Joint App. at 62-3. The transcript is cited in Kamisar, *Foreward: Brewer v. Williams—A Hard Look at a Discomforting Record*, 66 Geo. L. J. 209, 223 n. 65 (1977).

A. Yes, sir. Would you like to hear it?

Q. Yes.

A. All right. I said to Mr. Williams, I said, "Reverend, . . ." (Christian burial speech described).

Leaming's willingness, even eagerness, to testify in court with respect to the manner in which he was able to discover information about the whereabouts of the body of Pamela Powers is not consistent with the theory that Leaming "knew" he was acting unconstitutionally.

In addition, it cannot be maintained that Leaming reasonably should have known that his conduct was clearly unconstitutional. This Court's decision in *Brewer v. Williams* rested on an extension of the right to counsel as expressed in *Massiah v. United States*, 377 U.S. 201 (1964). But in *Massiah*, the accused was not aware that a police agent had infiltrated his inner circle. Here, Williams knew full well he was talking to a police officer. Of course, the majority in *Williams* ultimately ruled that the fact that *Massiah* did not know that his interrogator was a police officer was a distinction without a difference.²⁸ But Leaming cannot reasonably be charged with knowing in 1968 that this Court would apply *Massiah* to the facts presented ten years later. Indeed, ten years later, four members of the Court believed that such an extension was unwarranted.²⁹

²⁸But see opinion of Justice Blackmun, who states "Massiah was more seriously imposed upon . . . because he did not know he was under interrogation by a government agent." *Brewer v. Williams*, 430 U.S. at 440 n. 3 (Blackmun, J., dissenting).

²⁹The Court's failure to consider this distinction has been subject to critical commentary. See Note, *Brewer v. Williams: Express Waiver Extended to Sixth Amendment Right to Counsel*, 4 Ohio N. L. Rev. 833, 836 (1977).

While the decision in *Brewer v. Williams* did not rest on *Miranda* grounds, it cannot be maintained that Leaming as a reasonable police officer should have known that he was violating *Miranda*. Of course, *Miranda* had been decided two years before the transaction in question. But the *Miranda* opinion was narrowly focused on *interrogation* of the accused in custodial circumstances. Commentary following *Miranda* engaged in substantial speculation as to what exactly the court meant by *interrogation*.³⁰ As of the winter of 1968, no Supreme Court case had addressed the question.³¹ Given the strength of the *Miranda* minority and the general reluctance of the Court to invoke *Miranda* in subsequent cases to overturn con-

³⁰See Bator & Vorenberg, *Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 Colum. L. Rev. 62, 67 (1966).

³¹The question of what is *interrogation* under *Miranda* was finally explored by this Court in *Rhode Island v. Innis*, 446 U. S. 291 (1980). In that case, the accused was suspected of armed robbery in which the assailant had brandished a sawed off shotgun. When passing a school with handicapped students while transporting the accused to the station, one officer remarked to another, "God forbid one of them might find a weapon with shells and they might hurt themselves." 446 U. S. at 294-95. The suspect then interrupted and volunteered to show officers the location of the gun. This Court held that the conversation between officers was not "reasonably likely" to elicit an incriminating response and thus was not *interrogation* under *Miranda*. 446 U. S. at 303.

The similarities between *Innis* and *Brewer* are obvious. Justice Stevens found that Innis's "invocation of his right to counsel makes the two cases indistinguishable." 446 U. S. at 310 n. 7. And, as Justice Marshall noted, "One can scarcely imagine a stronger appeal to the conscience of a suspect—any suspect—than the assertion that if a weapon is not found an innocent person will be hurt or killed." 446 U. S. at 405. The fine line between *Innis* and *Brewer* conclusively demonstrates that Leaming cannot be charged with knowledge that his actions violated *Miranda* strictures.

victions,³² any belief that *Miranda* might not apply to the facts of this case cannot be characterized as unreasonable.³³

While the above consideration of *Miranda* and *Masiah* barely explores the rich complexity of the legal issues involved, even this brief discussion represents a far more sophisticated analysis than can reasonably be expected of law enforcement officers in their day-to-day activity.³⁴

³²The Court has generally avoided reversals of criminal convictions based on strict interpretation of *Miranda*. See *Michigan v. Tucker*, 417 U. S. 433 (1974); *Michigan v. Mosley*, 423 U. S. 96 (1975).

³³As one commentator has said with respect to the questions of whether interrogation occurred and whether Williams waived his right to counsel, "The majority's resolution . . . can be disputed indefinitely, depending upon one's own view of the facts in the record." Note, *Brewer v. Williams*, 11 Creighton L. Rev. 997, 1029-30 (1970). Similarly, it has been said that "The Court . . . found itself thrust into the maze of defining 'interrogation'" Note, *The Right to Counsel and the Strict Waiver Standard*, 57 Neb. L. Rev. 543, 548 (1978). See also Note, *The Right to Counsel: An Alternative to Miranda*, 38 La. L. Rev. 239, 239-40 (1977), where it is observed, "One of the most difficult and controversial areas of American criminal procedure today is the subject of pre-trial police interrogation of an accused . . ."; Note, *Constitutional Law-Sixth Amendment Right to Counsel-Waiver*, 45 Tenn. L. Rev. 112, 113 (1977), "The case demonstrates in an intriguing factual context the complex relationship between the right to counsel, incriminating statements, or confessions made in the absence of counsel, and the concept of waiver of fundamental rights;" Note, *Brewer v. Williams: The End to Post-Charging Interrogation*, 10 Sw. U. L. Rev. 331, 331 n. 3 (1978), noting that following *Miranda*, "considerable confusion has arisen regarding the scope of the decision;" Note, *Interrogation and the Sixth Amendment*, 53 Ind. L. Rev. 313, 313, (1978) (noting many cases upholding admissions without presence of an attorney).

³⁴This Court has recognized the situational roles played by law enforcement officers. In *Imbler v. Pachtman*, 424 U. S. 409 (1976), the Court observed, "frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation." *Id.* at 425.

While police can be reasonably expected to know the basics of constitutional law, they should not be charged with the knowledge of trained lawyers when courts engage in post hoc judgment on whether they acted in bad faith. Thus, while a police officer who executes a warrantless search without any colorable justification acts so unreasonably that bad faith may be inferred, a far different situation exists where an officer obtains a warrant from a magistrate that is later found invalid through refined analysis of difficult questions of constitutional law. Similarly, while an officer who physically batters a handcuffed suspect acts so unreasonably that bad faith may be inferred, a failure to give or repeat *Miranda* warnings at precisely the right time can be a simple error in judgment.

Here, under the facts presented in this case, it cannot be said that Detective Leaming reasonably should have known that his conduct would ten years later be found unconstitutional by a narrow majority of this Court. As the unanimous opinion of the Supreme Court of Iowa noted:

The issue of the propriety of the police conduct in this case . . . has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.³⁵

In conclusion, the unlawful law enforcement activity in this case is far from being so egregious that prosecution of the accused should not be tolerated. Even applying Respondent's less stringent section 1983 test, there is no basis for concluding that those who engaged in the

³⁵*State v. Williams*, 285 N. W. 2d at 260-61.

unlawful conduct knew or should have known that the questioned activity was unconstitutional. As a result, Petitioner has met its burden of showing absence of bad faith.

B. Since the question of absence of bad faith has not been the subject of an evidentiary hearing in either state or federal trial courts, the Court of Appeals erred in concluding that the State could not prove absence of bad faith.

Even assuming that the inevitable discovery exception requires a finding of absence of bad faith on the part of police officers, and even further assuming that absence of bad faith cannot be conclusively established by Petitioner at this stage of the proceeding, the Court of Appeals' decision remains infected with reversible error. Because the absence of bad faith issue has not been the subject of an evidentiary hearing in either state or federal trial courts, the Court had no basis for concluding that the Petitioner, as a matter of law, could not prove absence of bad faith.

The question of absence of bad faith was not raised in the state court suppression hearing at Williams' second trial. See Transcript of Motions to Suppress Evidence, pp. 3-90; (Joint App. 1-82), Ruling on Motions to Suppress Evidence, pp. 1-12 (Joint App. 82-93). The entire focus of the hearing was on whether the body of Pamela Powers actually would have been discovered by searchers, and if so, whether her physical condition would have been preserved. The Iowa Supreme Court injected the absence of bad faith issue into this case when it announced a "two pronged" inevitable discovery test.

In the habeas proceeding in the Federal District Court, Respondent did not properly raise the absence of bad faith issue. His pleadings did not mention it directly or in-

directly. While Respondent's Memorandum in Support of Petition cites *Brown v. Illinois*, 422 U.S. 590 (1975), the discussion of this "attenuation" case makes no reference at all to the Iowa Supreme Court's application of the absence of bad faith prong.³⁶ In citing *Brown*, Respondent appears only to be arguing that no inevitable discovery exception exists and that the case should be tested along the "attenuation" standards of *Brown*, a legal analysis not adopted by the Iowa court. While the State put on no evidence on the absence of bad faith issue in

³⁶The discussion of *Brown* is contained in a section of Respondent's Memo entitled "The 'Inevitable Discovery' Test Applied by the State Courts was Constitutionally Impermissible." This section amounted to a *facial* challenge to the two-pronged test developed by the Iowa Supreme Court. The argument was that the exception as developed by the Iowa Supreme Court would be "wholly inconsistent with the decisions of the United States Supreme Court concerning the Fifth and Sixth Amendment and the 'fruit of the poisonous' tree doctrine." Memorandum in Support of Petition at 21. Continuing the attack, the Respondent states that "contrary to the Iowa Supreme Court's characterization of this hypothetical test as an 'extension of the independent source exception to the rule of exclusion,' 285 N. W. 2d at 526 n. 3, the adoption of this theory 'mark[s] a sharp break with *Silverthorne*, *Nardone*, and *Wong Sun*." Memorandum at 22. The discussion continues that "the problem with the 'inevitable discovery' test applied by the trial court is . . . that it emasculates the exclusionary rule." Memorandum at 23 (emphasis added).

Having apparently demolished inevitable discovery on its face, the Respondent then purports to apply "the constitutionally appropriate fruit-of-the-poisonous tree standards to the instant case." Memorandum at 24. It is "[i]n this regard" that *Brown v. Illinois*, 422 U.S. 590 (1975), is "especially instructive." Memorandum at 25.

In concluding the section, the Respondent notes that "Since the 'inevitable discovery' doctrine applied by the state courts was constitutionally impermissible, their findings that the body and the evidence derived therefrom would have been discovered even in the absence of the flagrant Fifth and Sixth Amendment violations in this case are constitutionally irrelevant." Memorandum at 26.

See generally Joint App. 173-177.

the District Court (or in state court), this fact was not discussed in Respondent's Post Trial Memorandum. See Pet. Reply App. at 13-44. The Federal District Court made no findings on the alleged issue, and the Respondent did not move to enlarge findings of fact pursuant to Fed. R. Civ. P. 52b. Respondent's position on this procedural issue, see Respondent's Opposition to Certiorari at 6-7, thus amounts to the paradox that the absence of bad faith issue was actually litigated, even though the main participants did not realize it. Under these circumstances, the general rule that questions not litigated below will not be considered on appeal is fully applicable.³⁷

Even assuming Respondent's elliptical reference to *Brown v. Illinois* can be interpreted as preserving the issue for appeal, the procedural posture of the absence of bad faith question simply does not allow definitive adjudication of the issue *against* Petitioner under any circumstances. If this Court believes there is any legal doubt on the absence of bad faith question, the Petitioner is at least entitled to one evidentiary opportunity on the ques-

³⁷See, e.g., *Brown v. United States*, 411 U. S. 223, 229, 230 n. 4 (1973) (new arguments with respect to standing and constructive possession in Fourth Amendment context not considered); *Chiarella v. United States*, 445 U. S. 222, 235-37 (1980) (refusal to affirm securities law conviction on theory of liability not presented to jury). It is true that before the Court of Appeals in this case, Petitioner did not originally expressly claim that the absence of bad faith issue was improperly before the Court. *Williams v. Nix*, 700 F. 2d at 1175. Petitioner forcefully presented this argument in his petition for rehearing and rehearing en banc after the original panel issued its decision. See generally, 700 F. 2d at 1175 (Fagg, J., dissenting from denial of rehearing en banc).

The absence of bad faith issue was fleetingly mentioned in the briefs before the Court of Appeals, but was not substantially explored by either party. See Brief for Appellant at 24 (Joint App. at 182), Brief for Appellee, pp. 21-22 (Joint App. at 186-87).

tion in light of Respondent's procedural default in state and federal trial courts. *See Williams v. Nix*, 700 F. 2d 1164, 1175-76 (8th Cir. 1983) (Fagg, J., dissenting from denial of rehearing en banc).

Appellate restraint seems particularly appropriate in a habeas corpus proceeding where interests in finality and repose and comity between state and federal systems are unusually strong. There is, in Petitioner's view, serious doubt as to whether the question adjudicated by the Court of Appeals can be raised *at all* in a habeas attack. *Cf. Stone v. Powell*, 428 U.S. 465 (1976). *See* discussion under Part III, *infra*. Plainly, the aggressive posture of the Court of Appeals cuts roughly across the grain of this Court's recent cases urging an exceedingly cautious approach to exercise of federal habeas jurisdiction. *Engle v. Issac*, — U.S. —, 102 S. Ct. 1558 (1982); *Rose v. Lundy*, — U.S. —, 102 S. Ct. 1198 (1982); *Wainwright v. Sykes*, 433 U.S. 465 (1977). Under these circumstances, the State should not be forced to initiate a full blown trial fifteen years later, absent crucial evidence, where a limited hearing may be sufficient to resolve any residual doubts that may exist with respect to admissibility of the challenged evidence. *See United States v. Wade*, 388 U.S. 218, 242 (1967); *Jackson v. Denno*, 378 U.S. 391-96 (1964).

III. The rule in Stone v. Powell should be extended to inevitable discovery cases where highly probative and reliable evidence is challenged in a habeas proceeding after a full and fair opportunity to challenge the admissibility of the evidence on direct review in state court.

This case also squarely raises the important question of the applicability of the rule of *Stone v. Powell*, 428 U.S. 465 (1977), to non-Fourth Amendment cases involving ad-

missibility of highly probative and reliable physical evidence. The Court of Appeals dismissed the argument, noting erroneously that this Court "necessarily rejected" extension of *Stone* in *Brewer v. Williams*. *Williams v. Nix*, 700 F. 2d at 1170 n. 8 (Pet. App. 11). The issue, however, was expressly left open when this case was previously before the Court. *Brewer v. Williams*, 430 U.S. at 414 (Powell, J., concurring). One other case is presently before the Court which raises the issue of extension of *Stone* to non-Fourth Amendment cases. *White v. Finkbeiner*, 687 F. 2d 885 (7th Cir. 1982), *petition for cert. filed sub. nom. Fairman v. White*, 51 U.S.L.W. 3001 (U. S. June 18, 1982) (No. 81-2340).

The entire rationale of *Stone v. Powell* applies with full force to this Sixth Amendment case where the inevitable discovery exception is invoked to allow admission of highly probative and reliable physical evidence. Police will be adequately deterred by the possibility of losing convictions on direct appeal. The marginal deterrence value of relitigating the issue on collateral attack is minimal. And the interest in promoting finality in criminal judgments will be promoted. *See Stone v. Powell*, 428 U. S. at 492-94.

The reason *Stone v. Powell* has not been generally applied outside the Fourth Amendment is not because Fifth and Sixth Amendment violations should be categorically excluded from its reach because of some abstract reason or because the Fifth and Sixth Amendments are more highly placed in the constitutional hierarchy. Rather, Fifth and Sixth Amendment violations are generally not linked with highly probative and reliable physical evidence that nearly universally characterizes Fourth Amendment search and seizure cases. The Petitioner believes the

focus of the analysis in applying *Stone* should be on the nature of evidence gathered, not the type of constitutional violation which occurred.

The issue presented here is thus not whether *Stone v. Powell* applies to all cases where the right to counsel has been infringed. There may be occasions, for instance, where impairment of the right to counsel not involving admission of highly reliable evidence so undermines the fundamental fairness of the criminal proceeding that federal courts should not lightly relinquish their habeas jurisdiction. Here, however, the issue may even be narrowed to whether *Stone v. Powell* should be extended to non-Fourth Amendment claims where highly probative and reliable physical evidence has been obtained, or would have inevitably been obtained, through investigative means independent of the unlawful conduct.

Analytically, consideration of whether probative and reliable physical evidence is admissible under the inevitable discovery exception to the exclusionary rule is not much different from a challenge to the admissibility of evidence on Fourth Amendment grounds. In the Fourth Amendment context, the state court generally holds a suppression hearing, taking evidence and hearing argument on the question of whether a warrant is supported by probable cause or, in the alternative, whether a warrantless search is justified under the facts and circumstances presented. This inquiry is not qualitatively different from that which occurs when inevitable discovery is invoked. In the inevitable discovery setting, the state court takes evidence and hears argument on the question of whether law enforcement officials in fact would have inevitably discovered evidence through independent means that would be otherwise considered "fruit of the poisonous tree." Neither inquiry implicates the integrity of the

factfinding process. Neither inquiry involves an adjudication of fundamental rights.

The case is distinguishable from those concerning the suppression of confessions allegedly obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), to which *Stone v. Powell* might also be extended.³⁸ Unlike here where physical evidence is at issue, introduction of communicative evidence obtained from the accused in violation of *Miranda* may, depending on the context, affect the fairness and accuracy of the criminal process. And, also unlike this case, litigants in *Miranda* cases might conceivably transform their challenge from a comparatively narrow attack on whether *Miranda* strictures were followed into a more broadly based assault on the voluntariness of their confession, thereby reopening the door to the federal courthouse. *White v. Finkbeiner*, *supra*, 687 F.2d at 892-93.

Nothing in *Rose v. Mitchell*, 443 U.S. 545 (1978), is to the contrary. In this case, the Court refused to extend *Stone v. Powell* to claims of discrimination in the selection of a grand jury. The Court doubted that a full and fair hearing of the claim would be available in state courts since the appointing trial court would initially decide the merits of the claim. 443 U.S. at 561. Further, the Court noted a constitutionally protected right was at stake, not a judicially created remedy. 443 U.S. at 562. Finally, the Court noted that, unlike in *Stone*, "the deterrent effect of federal review is likely to be great, since state officials . . . may be expected to take note of a federal court's determination that their procedures are un-

³⁸See *White v. Finkbeiner*, 687 F.2d 855 (7th Cir. 1982), petition for cert. filed sub nom. *Fairman v. White*, 51 U.S.L.W. 3001 (U.S. June 18, 1982) (No. 81-2340).

constitutional and must be changed." 443 U.S. at 563. None of those distinguishing features are present in the case at bar.

The Respondent had a full and fair opportunity to litigate the admissibility of Pamela Powers' body in state court. In the District Court, Respondent urged that previously overlooked photographs and recent deposition testimony of the investigative officer contradicted the state court's findings. See *Williams v. Nix*, 528 F. Supp. at 670-71. But, as the District Court noted, "this newly discovered evidence neither adds much to nor subtracts much from the suppression hearing." 528 F. Supp. at 671 n.6. Notwithstanding this evidence, according to the District Court:

... Pamela Powers' body would soon have been found by the searchers in essentially the same condition it was in at the time of the actual discovery, even if petitioner had not made any statements and had not led police to the body. The body was right next to the end of a culvert located beneath a road. Much of the body was covered with snow, but her face and part of her brightly colored striped shirt were not touched by snow and were completely exposed to the view of any person looking at the end of a culvert. The searchers were going into the ditches to look into all culverts, and they would have searched along the road where the culvert and body were located.

528 F. Supp. at 671.

Respondent also attacked the impartiality of the trial court in the form of an affidavit submitted by Respondent's trial counsel stating that the Judge told him in informal conversation the chances of reversal on the issue of inevitable discovery were about 50-50 and that if he were prosecuting, he would have put on more evidence for the State. See *Crawford Affidavit*, Joint App. at 172. Even taking these self serving allegations at face value,

they do not show that Respondent did not have a full and fair opportunity to litigate the issue. In Iowa, findings of fact on constitutional questions in criminal cases are reviewed de novo by the Supreme Court. See *State v. Williams*, 285 N.W.2d at 260-262. The court's reported observations thus do not suggest any bias or partiality, and the issue was not raised on direct appeal.

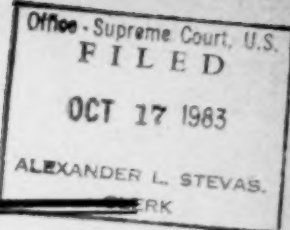
Extension of *Stone v. Powell* to the present case would vindicate the policies of repose and finality in the criminal law. As Justice Harlan noted: "If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definite answer to the questions litigants present or else it never provides an answer at all. *Mackey v. United States*, 401 U.S. 667, 691 (1970). This case already comes close to the "or else" feared by Justice Harlan. It is respectfully submitted that the interest in finality and repose on the issue of admissibility of evidence which in fact enhances the integrity and reliability of the factfinding process overrides all other considerations.

CONCLUSION

For the above mentioned reasons, it is respectfully submitted that the decision of the Court of Appeals in this case must be *Reversed*.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

CRISPUS NIX, WARDEN OF THE
IOWA STATE PENITENTIARY,

Petitioner,

VS.

ROBERT ANTHONY WILLIAMS,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

BRIEF OF THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether physical evidence that has been obtained as a direct and intended result of a violation of the Sixth Amendment right to counsel during interrogation nevertheless may be admitted at trial upon hypothetical "proof" that it is more likely than not that the evidence would have been obtained through lawful means.

2. Whether the Court of Appeals correctly concluded that if any hypothetical "inevitable discovery" doctrine could be constitutionally valid, it must include a requirement that the State prove "good faith".

3. Whether the Court of Appeals correctly concluded that the State had failed to show that a police officer acted in good faith when he violated the respondent's Sixth Amendment right to counsel.

4. Whether it is more likely than not that the evidence at issue would have been discovered through lawful means if the respondent's Sixth Amendment right to counsel had not been violated.

5. Whether *Stone v. Powell* should be extended beyond its Fourth Amendment context to apply to violations of the Sixth Amendment right to counsel.

6. Whether *Stone v. Powell* should be applied to state court decisions creating new exceptions to the exclusionary rule that would create constitutionally unacceptable incentives for future police misconduct.

7. Whether the respondent had a full and fair opportunity to litigate the merits in the state courts.

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STATEMENT OF THE CASE

In *Brewer v. Williams*, 430 U.S. 387 (1977), this Court held that the respondent's Sixth Amendment right to counsel was violated when a police officer, Detective Cletus Leaming, purposefully elicited the location of the victim's body from the respondent before he could consult with his attorney, contrary to an agreement with that attorney. The central issue in this case is whether evidence derived from the body as a direct result of this violation was properly admitted at the respondent's second trial. The Court of Appeals answered this question in the negative, and directed issuance of a conditional writ of habeas corpus. *Williams v. Nix*, 700 F.2d 1164 (8th Cir. 1983).

The *amicus curiae* brief of the United States adequately describes the proceedings below. (U.S. Br. 1-7). In the interests of brevity and clarity, this Brief will reserve detailed discussion of the evidentiary record for the relevant portions of the Argument, *infra*.

SUMMARY OF THE ARGUMENT

A. The evidence at issue in this case was obtained as a direct result of a violation of the respondent's Sixth Amendment right to counsel. The State argues that the evidence nevertheless should be admissible because it is more likely than not that the evidence would have been discovered by lawful means anyway. The State defends this hypothetical-probable-discovery doctrine by asserting that its impact on the deterrent function of the exclusionary rule would be relatively slight.

The central problem with the State's deterrence analysis—which derives from this Court's *Fourth* Amendment decisions—is that it is wholly inapplicable to *Sixth* Amendment violations such as the one involved in this case. Unlike the *Fourth* Amendment exclusionary rule, the essential purpose of which is to deter future police misconduct, the *Sixth* Amendment "exclusionary rule" is designed to protect the personal

right of the defendant to a fair trial. In particular, the right to counsel during "interrogation" is designed to protect the defendant from the state's attempts to elicit information from him for use *at trial* without his having the advice of a representative who can judge the impact of such evidence on the *trial*; indeed, there is no completed violation of the right to counsel *until* the evidence is admitted at trial. Consequently, the Sixth Amendment "exclusionary rule" is an integral and indispensable element of the right to counsel during "interrogation," and is not designed to deter future police misconduct.

Balancing the deterrent effect of excluding the evidence against the costs of doing so therefore is irrelevant to this case. Since it concededly was obtained as a direct and intended result of the same violation of the respondent's right to counsel that was involved in *Brewer v. Williams*, 430 U.S. 387 (1977), the evidence at issue in this case, like the evidence in *Brewer*, was constitutionally inadmissible.

B. Even if this were a Fourth Amendment case, the hypothetical-probable-discovery doctrine would not be constitutional. That doctrine would create a substantial incentive for police misconduct, because police officers would know that even if they used unlawful means to obtain evidence, it would still be useable at trial if the state could "prove" that the evidence probably would have been discovered anyway by hypothetical lawful means. When, as here, the evidence was physical evidence, such *post hoc* rationalization most often would be possible, since the state, with hindsight knowledge of the location of the evidence, would be able to hypothesize a suitably intensive investigation. And even if it turned out that the state could not "prove" hypothetical-probable-discovery, the officer would not have *lost* anything by his unlawful conduct.

C. The State's so-called "independent inevitable discovery" version of the hypothetical-probable-discovery doctrine—under which the State would have to show that the lawful means by which the evidence supposedly would have been discovered were actually in progress—would be no more con-

sistent with the purposes of the Sixth Amendment exclusionary rule, or with the deterrent purposes of the Fourth Amendment exclusionary rule. And in any event, the "independent inevitable discovery" doctrine would not apply to this case—since the only lawful search for the body that was actually in progress was not conducted in, or planned for, the county in which the body was located.

D. The hypothetical-probable-discovery doctrine is inconsistent with the Sixth Amendment "exclusionary rule" involved in this case regardless of whether the officer violated the defendant's right to counsel in good faith. Nevertheless, the Court of Appeals was correct in concluding that if any hypothetical-probable-discovery doctrine could be valid, it must include a requirement that the state show that the offending officer acted in good faith. Moreover, the Court of Appeals' conclusion that the State had not shown good faith was correct, under a subjective or objective standard, since Detective Leaming's specific purpose was to elicit information about the body before the respondent could reach his attorney—in violation of an agreement with that attorney.

E. Even under the broadest possible version of the hypothetical-probable-discovery doctrine, and regardless of Leaming's good faith, the evidence at issue would not be admissible because the record—which includes evidence introduced in the District Court showing that the state courts relied on false testimony presented by the State—demonstrates that the organized search for the body probably would not have discovered the body.

F. Because the Sixth Amendment "exclusionary rule" is an indispensable element of the right to counsel that is designed to protect the personal right of the defendant to a fair trial, the holding of *Stone v. Powell*, 428 U.S. 465 (1976)—which is based on the deterrent function of the Fourth Amendment exclusionary rule—does not apply to this case. Moreover, even from a Fourth Amendment deterrence standpoint, *Stone* should not apply because the broad new exception to the exclusionary rule on which the Iowa courts relied would create

significant incentives for future police misconduct. Finally, *Stone* would not preclude review on the merits because the respondent did not have a full and fair opportunity to litigate the merits in state court.

ARGUMENT

I. ADMISSION OF THE EVIDENCE AT ISSUE IN THIS CASE, WHICH WAS OBTAINED AS A DIRECT RESULT OF THE VIOLATION OF RESPONDENT'S RIGHT TO COUNSEL, WOULD VIOLATE THE SIXTH AMENDMENT REGARDLESS OF WHETHER THE EVIDENCE PROBABLY *WOULD* HAVE BEEN DISCOVERED IN ANY EVENT.

This Court previously has held that the respondent's Sixth Amendment right to counsel was violated when a police officer, Detective Cletus Learning, purposefully elicited the location of the victim's body from the respondent before he could consult with his attorney. *Brewer v. Williams*, 430 U.S. 387 (1977). Moreover, it is undisputed that the discovery of the evidence at issue in this proceeding—all of which was connected with the body—was a direct and intended result of that violation. The admission of this evidence cannot be justified on the basis of any doctrine that this Court previously has recognized. Consequently, the petitioner and two of his *amici* ask this Court to adopt a broad new exception to the Sixth Amendment exclusionary rule under which evidence that was obtained as a result of a violation of the Sixth Amendment right to counsel nevertheless would be admissible if the State could "prove," hypothetically, that the evidence more likely than not *would*¹

¹ The United States, as *amicus curiae*, attempts to make the proposed new exception seem less speculative by arguing that its test is a "strict" one of whether the evidence *would* have been discovered. (U.S. Br. 16, n.8). At the same time, however, the United States argues that the appropriate burden of proof on this issue is the "preponderance of the evidence" standard that was used by the Iowa courts. (*Id.*) Plainly, the juxtaposition of this burden of proof with the underlying substantive test results in a doctrine under which the state be required to "prove" only that the evidence *probably* would have been discovered.

have been discovered by lawful means even if the violation had not occurred. Although this new exception has been called the "inevitable discovery" doctrine, a more descriptive label would be the "hypothetical probable discovery" doctrine. Under any name, this doctrine would be wholly inconsistent with the fundamental purposes of the Sixth Amendment right to counsel.

A. The most obvious—and fundamental—flaw in the briefing of the petitioner with regard to the "inevitable discovery" issue is that he treats this case as if it involved the *Fourth* Amendment exclusionary rule, with no attention to the implications of its *Sixth* Amendment context. Thus, the Petitioner seeks to justify adoption of his version of the hypothetical-probable-discovery doctrine² by arguing that the impact of that doctrine on the deterrent function of the exclusionary rule would be too small to outweigh the costs of excluding the evidence in question here. (Pet. Br. 10-17). However, this deterrence/balancing approach is completely inapplicable to violations of the Sixth Amendment right to counsel.

1. This Court has made it clear that the Fourth Amendment exclusionary rule is not designed to protect or vindicate any personal right of the defendant in a criminal case; nor is it justified by a need to protect the integrity of the criminal judicial process. Rather, the primary justification for the judicially-created Fourth Amendment exclusionary rule is the general deterrence of future police misconduct outside the context of formal judicial proceedings. See, e.g., *Stone v. Powell*, 428 U.S. 465, 486 (1976); *United States v. Janis*, 428 U.S. 433, 466 (1976). By contrast, as the following paragraphs

² The petitioner—but not his amici—proposes a minor variation on the hypothetical-probable-discovery doctrine, which he calls "independent inevitable discovery," under which the state must show that a lawful investigation aimed at discovering the evidence in question was actually underway. (Pet. Br. 11-17). As Division III, *infra*, will show, this variation is no more valid constitutionally than the basic hypothetical-probable-discovery doctrine described above—and in any event would not apply to the facts of this case.

will show, the Sixth Amendment "exclusionary rule" involved in this case is designed to protect the personal rights of defendants in formal judicial proceedings, and the fairness and integrity of the trial itself, and therefore does not depend on a deterrence rationale.

2. The right of a criminal defendant to the assistance of counsel is a fundamental right that is "indispensable to the fair administration of our adversary system of criminal justice." *Brewer v. Williams*, 430 U.S. 387, 398 (1977); see also *Coleman v. Alabama*, 399 U.S. 1 (1970); *Massiah v. United States*, 377 U.S. 201 (1964); *Powell v. Alabama*, 287 U.S. 45 (1932). Unlike the Fourth Amendment, the Sixth Amendment right to counsel necessarily involves the judicial process, since that right does not attach until formal adversary proceedings have commenced. See, e.g., *Kirby v. Illinois*, 406 U.S. 682 (1973).³ Of course, the right to counsel applies to any critical pretrial stage of a criminal proceeding; but the essential function of counsel during the pre-trial stages is to protect and preserve the ability of counsel to provide meaningful assistance at trial. *Massiah v. United States*, *supra*, at 204; *Coleman v. Alabama*, *supra*, at 7.

In an "interrogation" case like this one, the purpose of the defendant's right to counsel is to protect him from the state's post-initiation efforts to obtain evidence from him for use at trial without his having the advice of a representative who is knowledgeable in the law and able to judge the impact of such evidence on the ability to defend at trial. *Brewer v. Williams*, *Massiah v. United States*, *supra*. Indeed, there is no completed violation of the right to counsel until evidence that has been obtained in the absence of counsel is admitted at the defendant's trial. Thus, in *Massiah*, this Court indicated that

³ "The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. . . . It is then that a defendant finds himself faced with the judicial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby v. Illinois*, *supra*, at 689.

the government was permitted to elicit information from an indicted suspect in the absence of counsel for investigative purposes, so long as it did not use the information "as evidence against him at his trial." 377 U.S. at 207. See also *Weatherford v. Bursey*, 429 U.S. 545 (1977) (no § 1983 cause of action for violation of right to counsel unless evidence derived from official misconduct used at trial).

3. Since the right to counsel is designed to protect the defendant from the use at trial of evidence elicited from him in the absence of counsel, it is tautological that this right would have no meaning if the state could engage in the prohibited conduct and then use the resulting evidence against the defendant at trial. Hence, the Sixth Amendment right to counsel, unlike the Fourth Amendment right to be free from unreasonable searches and seizures outside the judicial process, necessarily requires exclusion from the trial of evidence that has been obtained as a result of a violation of that right.

[T]he *Massiah* "exclusionary rule" is not merely a prophylactic device; it is not designed to reduce the risk of actual constitutional violations and is not intended to deter any pretrial behavior whatsoever.

Schulhofer, *Confessions and the Court*, 79 Mich. L. Rev. 865, 889 (1981).

4. Given that an "exclusionary rule" is an integral and indispensable element of the Sixth Amendment right to counsel at post-initiation "interrogations," the "balancing" approach relied on by the petitioner to defend the hypothetical-probable-discovery doctrine—an approach that derives from the purely deterrent purposes of the *Fourth* Amendment exclusionary rule—is completely inapposite to this case. The validity of this conclusion is supported by *New Jersey v. Portash*, 440 U.S. 450 (1979), in which this Court held that statements obtained from a defendant pursuant to a grant of use immunity were not admissible to impeach the defendant at trial. In *Portash*, this Court explicitly rejected the use of the "balancing" approach under which it had held that evidence obtained as a result of violations of the prophylactic rules of

Miranda v. Arizona, 384 U.S. 436 (1966), was admissible to impeach. While *Portash* dealt with a Fifth Amendment violation, its reasoning applies with full force to evidence obtained in violation of the Sixth Amendment right to counsel. Just as the Fifth Amendment necessarily includes a personal right not to have evidence that the defendant has been compelled to provide (even at a pre-trial stage) admitted at trial, the preceding paragraphs have demonstrated that the Sixth Amendment necessarily includes a personal right not to have information that has been elicited in violation of the defendant's right to counsel admitted at trial—without regard to any balancing of interests. Schulhofer, *supra*, at 889-90; see also *United States v. Brown*, 699 F.2d 585, 589-90 (2d Cir. 1983) (evidence obtained in violation of defendant's Sixth Amendment right to counsel not admissible to impeach); *United States v. Henry*, 447 U.S. 264 (1980) (excluding evidence obtained in violation of Sixth Amendment right to counsel in § 2255 proceeding).⁴

5. The constitutional inadmissibility of the evidence in this case is made particularly clear by the fact that Leaming's conduct obviously and admittedly was designed to produce exactly the kind of evidence that it did produce before Williams could reach his attorney. Indeed, it is apparent that Leaming's conduct had no purpose other than gathering evidence for use at trial, such as discovering the victim alive—since Leaming testified at the 1969 suppression hearing that he knew the victim was dead. (App. to *Brewer v. Williams* at 96). Since the evidence at issue in this case, precisely like the evidence involved in *Brewer v. Williams*, *supra*, was obtained as a direct and intended result of the violation of the respondent's Sixth Amendment right to counsel, effectuation of that right required that the State not have the benefit of the evidence at trial; in short, this case is indistinguishable from *Brewer* itself.

⁴ In connection with *Portash*, it should be noted that the District Court in the first habeas corpus proceeding held that the respondent's Fifth Amendment rights were violated, in that his statements to Leaming were involuntary. *Williams v. Brewer*, 375 F. Supp. 170, 179-84 (S.D. Iowa 1974).

B. The preceding analysis makes any consideration of lower court authority technically superfluous. Nevertheless, the respondent would note that the claims of the petitioner and the United States that all of the federal courts of appeals have "embraced" or "endorsed" an "inevitable discovery" doctrine "in one form or another" (Pet. Br. 10; U.S. Br. 10) are at best misleading, for several reasons:

1. Most significantly, none of the cases cited by the petitioner—or any other Circuit Court decisions that the respondent has been able to locate—involved evidence obtained as a result of violations of the Sixth Amendment right to counsel.⁵ As Division I(A), *supra*, has demonstrated, the "balancing" approach on which the hypothetical-probable-discovery doctrine purports to rest is wholly inapplicable to Sixth Amendment violations.

2. In the overwhelming majority of the cases cited by the petitioner and the United States, the courts' references to the "inevitable discovery" doctrine were mere dictum, since the courts already had held either that there had been no constitutional violation in the first place⁶ or that the "independent

⁵ In *Government of the Virgin Islands v. Gereau*, 502 F.2d 914 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975), the court noted that law enforcement officers denied a defendant's request for counsel before interrogating him. However, because the interrogation took place before this defendant was arraigned, *id.* at 920-921, the interrogation could not have violated the Sixth Amendment. Although the court of appeals did not specify the respect in which the defendant's rights were violated, it appears that the violation was of the prophylactic rule of *Miranda v. Arizona*, 384 U.S. 436 (1966). Violations of prophylactic rules are of course subject to a deterrence/balancing analysis. See *Harris v. New York*, 401 U.S. 222 (1971).

⁶ *Wayne v. United States*, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963); *United States v. Fisher*, 700 F.2d 780 (2d Cir. 1983); *United States v. Soehnlein*, 423 F.2d 1051 (4th Cir.), *cert. denied*, 399 U.S. 913 (1970); *United States v. Wiga*, 662 F.2d 1325 (9th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982) ("inevitable discovery" referred to in footnote, 662 F.2d at 1333, n.9). See also *Papp v. Jago*, 656 F.2d 221 (6th Cir. 1981) (apparently holding underlying *Miranda* violation harmless error).

source" or "attenuation" exception applied.⁷ Moreover, in the three cases in which the "inevitable discovery" doctrine appears to have been a necessary part of the court's analysis—all of which involved Fourth Amendment or *Miranda* violations—the courts used a much higher burden of proof than the preponderance-of-the-evidence standard applied by the Iowa courts in this case.⁸

3. Decisions in several of the circuits have indicated disapproval of an "inevitable discovery" exception.⁹ Within those circuits there are, at best, inter-panel disagreements with regard to the "inevitable discovery" doctrine that have not been resolved through in banc decisions.

C. Given the Court of Appeals' approach to this case (see Division IV, *infra*), it should be noted that the preceding analysis applies regardless of whether Detective Learning could be said somehow to have acted in good faith. There is nothing in the nature or purpose of the right to counsel that

⁷ *United States v. Bienvenue*, 632 F.2d 910 (1st Cir. 1980); *United States v. Fisher*, *supra*; *United States v. Brookins*, 614 F.2d 1037 (5th Cir. 1980); *United States ex rel. Owens v. Twomey*, 508 F.2d 858 (7th Cir. 1974); *United States v. Schmidt*, 573 F.2d 1057 (9th Cir.), *cert. denied*, 439 U.S. 881 (1978) ("inevitable discovery" mentioned in footnote, 573 F.2d at 1065-66, n.9); *United States v. Huberts*, 637 F.2d 630 (9th Cir. 1980), *cert. denied*, 451 U.S. 975 (1981); *United States v. Kandik*, 633 F.2d 1334 (9th Cir. 1980); *United States v. Roper*, 681 F.2d 1354 (11th Cir. 1982) (applying "inevitable discovery" in situation in which search was valid as incident to arrest).

⁸ *Government of the Virgin Islands v. Gereau*, 502 F.2d 914, 927 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975) (requiring "clear and convincing" evidence); *United States v. Apker*, 705 F.2d 293, 307 (8th Cir. 1983) ("illegal warrant clearly did no more than hasten the discovery of the guns"); *United States v. Romero*, 692 F.2d 699, 704 (10th Cir. 1982) (danger of admitting evidence on basis of speculation diminished when, "as here, the evidence clearly would have been discovered within a short time").

⁹ See *Bynum v. United States*, 262 F.2d 465 (D.C. Cir. 1958); *United States v. Alvarez-Porras*, 643 F.2d 54, 62-65 (2d Cir. 1981); *United States v. Paroutian*, 299 F.2d 486, 489 (2d Cir. 1962); *United States v. Houttin*, 525 F.2d 943, 950 (5th Cir. 1976); *United States v. Griffin*, 502 F.2d 959 (6th Cir. 1974); *United States v. Hoffman*, 607 F.2d 280, 285-86 (9th Cir. 1979).

indicates that "good faith" violations of that right are constitutionally acceptable, and this Court has never suggested that good faith is an issue in cases involving the Sixth Amendment "exclusionary rule." See *United States v. Henry*; *Brewer v. Williams*; *Massiah v. United States*, *supra*.

II. EVEN IF THIS WERE A FOURTH AMENDMENT CASE, THE HYPOTHETICAL-PROBABLE-DISCOVERY DOCTRINE WOULD BE CONSTITUTIONALLY INVALID

A. The preceding Division has demonstrated that the hypothetical-probable-discovery doctrine would be inconsistent with the Sixth Amendment right to counsel involved in this case, and that the evidence at issue therefore was constitutionally inadmissible. Of course, this point by itself requires affirmance of the Court of Appeals' decision. But even if one accepted the petitioner's incorrect premise that the Sixth Amendment "exclusionary rule," like its Fourth Amendment counterpart, served only a general deterrence function, adoption and application of a hypothetical-probable-discovery exception in this case would be improper.

1. As previously noted, the essential justification for the Fourth Amendment exclusionary rule is that it will remove a primary incentive for police misconduct. Consistently with this rationale, this Court has recognized some situations in which the Fourth Amendment exclusionary rule will not apply. For example, under the "independent source" doctrine, evidence that *in fact* has been derived from a source independent of police misconduct need not be suppressed. *United States v. Crews*, 445 U.S. 463 (1980); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).¹⁰ This Court's decisions

¹⁰ For other "exceptions" to the Fourth Amendment exclusionary rule, see, e.g., *Wong Sun v. United States*, 371 U.S. 471 (1963) ("attenuation" doctrine); *United States v. Havens*, 446 U.S. 620 (1980) (evidence obtained in violation of Fourth Amendment admissible to impeach defendant in some circumstances); *United States v. Calandra*, 414 U.S. 338 (1974) (evidence obtained in violation of Fourth Amendment admissible in grand jury proceedings).

recognizing "exceptions" to the Fourth Amendment exclusionary rule have rested on the conclusion that when those exceptions applied, the incremental deterrent effect of excluding the challenged evidence was not significant, and therefore did not outweigh the competing costs of excluding relevant evidence. In proposing the adoption of a new hypothetical-probable-discovery exception in this case, the petitioner and his *amici* assert that this exception would not have any significant impact on the deterrent function of the exclusionary rule. However, the paragraphs that follow will show that such an exception in fact would emasculate the exclusionary rule's deterrent function, especially in cases such as this one.

2. From a Fourth Amendment deterrence standpoint, the infirmity of the hypothetical-probable-discovery doctrine is that it would create a strong incentive for an officer (like Detective Learning in this case) to use unlawful means to gain evidence for use against a criminal defendant:

a. When the officer believed that there was a substantial likelihood that the evidence also could be obtained by lawful means, the hypothetical-probable-discovery doctrine would destroy the incentives otherwise created by the exclusionary rule against the use of unlawful means—since the officer would know that even if he used such unlawful means, the evidence he obtained nevertheless would be admissible when the prosecution showed that the evidence probably would have been obtained anyway through lawful means.

b. This incentive to engage in unlawful conduct is perhaps most apparent when the likelihood that the evidence was discoverable by lawful means is relatively high. But even when the officer had substantial doubts that the evidence would be obtained lawfully, the hypothetical-probable-discovery doctrine would provide a strong incentive to use the contemplated unlawful means, for two complementary reasons:

i. First, quite apart from the officer's assessment of the likelihood that the evidence actually would be obtained by lawful means, the officer most often would be able to anticipate

that after the evidence was discovered by unlawful means, the state, with the benefit of hindsight, would be able to make out an effective hypothetical case that lawful investigative methods would have produced the evidence in any event. This would be especially true when, as in this case, the evidence was physical evidence the only barrier to the discovery of which was knowledge of its location: Once the evidence was discovered by unlawful means, the state could, without purposeful after-the-fact fabrication, hypothesize as intensive a lawful investigation as it wished, since actual historical facts would not stand in the way. As Division III, *infra*, will show, the record in this case vividly illustrates how readily the hypothetical-probable-discovery doctrine's potential for *post hoc* rationalization can be realized.

ii. Second, whatever the officer's doubts that the evidence could be obtained through lawful means, he would realize that even if the prosecution was not able later to "prove" hypothetical-probable-discovery through lawful means, his engaging in unlawful conduct would not render inadmissible any evidence that otherwise would have been available for use at trial. To use a gambling analogy, the hypothetical-probable-discovery doctrine at minimum would make unlawful conduct a "heads we win, tails we tie" proposition.

c. Contrary to the suggestion of the petitioner (Pet. Br. 13), the difference between the "independent source" doctrine and the hypothetical-probable-discovery doctrine is not simply an empty difference of timing. Under the "independent source" doctrine, the officer in question will realize that the evidence in question will be admissible only if the evidence in fact is discovered through legal means—and *not* as a result of the officer's illegal conduct. Moreover, the officer will realize that if he engages in illegal conduct that is "successful" in producing evidence, the prosecution's ability to use that evidence through the "independent source" route will be destroyed. As a result, the independent source doctrine provides a disincentive for the officer to seek evidence through illegal means.

Under the hypothetical-probable-discovery doctrine, however, the officer would realize that even if he engaged in unlawful conduct, the resulting evidence would be admissible if the prosecution could "show" that the evidence probably *would* have been discovered anyway, through "proof" that could be created after the fact. Moreover, the officer would realize that his "successful" use of unlawful methods would not destroy the prosecution's ability to construct such speculative "proof." Indeed, by discovering the evidence through unlawful means—and thereby eliminating any possibility of knowing what really would have happened in the absence of the illegality—the officer would actually enhance the ability of the state to *speculate* about what would have happened.

d. As the preceding analysis demonstrates, if there were any situations in which the doctrine would not produce a significant incentive to engage in unlawful conduct, they would be only those situations in which discovery of the evidence through lawful means was so unlikely that the doctrine in any event would not be applicable. Plainly, a doctrine that is constitutionally acceptable only in cases in which it has no application is not a sensible doctrine.

3. While "bad faith" police misconduct may be especially suitable for deterrence, nothing in the foregoing deterrence analysis depends on whether the officer acted in bad faith. This is of course consistent with this Court's decisions, which have not made application of the Fourth Amendment exclusionary rule turn on the bad faith of the offending officer. But even if bad faith were an issue, it would not matter in this case. See Division IV, *infra*.¹¹

¹¹ The societal costs of excluding evidence in cases to which the hypothetical-probable-discovery doctrine would apply provide no justification for the adoption of that doctrine, since those costs certainly are no *greater* than those of excluding unlawfully obtained evidence in any other cases. Indeed, the exclusionary rule need not cost the state *anything* in hypothetical-probable-discovery situations—since whenever it is true that evidence is discoverable by lawful means, the state will not be deprived of its use so long as its agents observe the constitution.

B. The defense of the hypothetical-probable-discovery doctrine by the United States as *amicus curiae* relies in part on an abstract discussion of the concept of causation. The United States concedes, as it must, that the Sixth Amendment violation previously recognized by this Court was the "*de facto*" cause of the discovery of the evidence in question. But the United States argues that when evidence probably would have been discovered even in the absence of a constitutional violation, the violation was not the "*legal*" cause of the discovery—and that this asserted lack of "*legal*" causation renders the evidence constitutionally admissible. (U.S. Br. 13-14). For at least two basic reasons, this argument is without merit:

1. Perhaps most obviously, the United States' "legal causation" argument fails to address the effect of the hypothetical-probable-discovery doctrine on the fundamental non-deterrent purposes of the Sixth Amendment "exclusionary rule." Moreover, as the preceding paragraphs have shown, allowing evidence that in fact had been discovered as a result of unconstitutional conduct to be admitted at trial under an hypothetical-probable-discovery exception would provide a significant incentive to law enforcement officers to engage in such conduct—quite apart from whether hypothetical probable discovery would eliminate "legal" causation.

2. In any event, the "legal causation" argument fails even on its own terms. For one thing, the tort-law examples that the United States derives from Professor Prosser (U.S. Br. 13) simply are not analogous to this case. The respondent would not dispute that "[a] failure to fence a hole in the ice plays no part in causing the death of runaway horses which could not have been halted if the fence had been there." (*Id.*). However, the essential feature of this example is that the unlawful conduct (failing to fence the hole) did not in fact produce the result at issue—the death of the horses. By contrast, Detective Leaming's unlawful conduct concededly *did* in fact produce the result at issue—the discovery of the evidence connected with the body. Within the law of torts, a more apt analogy to this case would be a situation in which A sells a rope to C, "who is

bent on hanging himself," but A then shows that B would have sold rope to C if he had not done so. In this example, A's conduct is a "legal" cause of C's death—even though that death would have occurred even if A had not engaged in that conduct. W. Prosser, *Law of Torts* § 41, 244, n.9 (3d ed. 1964).

The example discussed above illustrates a more general problem with the United States' "causation" argument—namely, that even in the law of torts, "causation" is not determined simply by a hypothetical "but for" test. Rather, conduct "is a cause of an event if it was a material element and a substantial factor in bringing it about." *Id.* at 244; *see also* *Restatement (Second of Torts)* § 431 (1965). The same test applies as well in the criminal law. *See* W. LaFave & A. Scott, Jr., *Criminal Law* § 35, at 249-250 (1972).¹² In this case, of course, there is no dispute that the violation of the respondent's Sixth Amendment right to counsel was "a material element and a substantial factor" in bringing about the discovery of the evidence in question.¹³

III. THE PETITIONER'S PROPOSED "INDEPENDENT INEVITABLE DISCOVERY" VARIATION ON THE HYPOTHETICAL-PROBABLE-DISCOVERY DOCTRINE WOULD NOT RENDER THAT DOCTRINE CONSTITUTIONALLY MORE VALID—AND IN ANY EVENT WOULD NOT APPLY TO THE FACTS OF THIS CASE

While the United States argues for a hypothetical-probable-discovery doctrine that would apply whenever the prosecution could "prove" that the challenged evidence probably would

¹² To take a criminal law analogy, suppose that D pushes V off a cliff to his death—but that if he had not done so, a runaway truck would, at the same moment, have struck V and caused his death even sooner than the fall. In this situation, D would not be able to escape liability on the ground that his conduct did not "cause" V's death—even though the truck *would* have killed V just as quickly anyway. *See id.*

¹³ Under the "independent source" doctrine, by contrast, the illegal conduct is not a factor, substantial or otherwise, in bringing about the discovery of the evidence.

have been lawfully discovered in any event (U.S. Br. 10-15), the petitioner attempts to distinguish "three separate and distinct factual contexts" involving hypothetical probable discovery, and then defends only the one he dubs "independent inevitable discovery." (Pet. Br. 11). The essential characteristic of the "independent inevitable discovery" situation is that "lawfully obtained leads totally independent of collateral illegal conduct are in fact being aggressively pursued by law enforcement." Admission of evidence that in fact is discovered as a result of the illegal conduct supposedly is justified in this situation because "courts are not asked to speculate about whether police would have actually launched the legitimate investigative efforts. . . ." (*Id.*)

The petitioner's attempt to justify admission of the evidence at issue in this case under his so-called "independent inevitable discovery" doctrine is fatally flawed in several respects:

A. First, and most obviously, the "independent inevitable discovery" doctrine—which the petitioner defends solely on the basis of a Fourth Amendment deterrence analysis—is inconsistent with the fundamental non-deterrent purposes of the Sixth Amendment "exclusionary rule" involved in this case: the addition of a requirement that the state show that a lawful investigation was actually underway makes no difference to the Sixth Amendment analysis outlined in Division I, *supra*.

B. Second, even if this were a Fourth Amendment case, the impact on the exclusionary rule's deterrent function of the "independent inevitable discovery" doctrine would be the same as that of the basic hypothetical-probable-discovery doctrine discussed in Division II(A), *supra*. Indeed, if an officer was aware that a lawful investigation aimed at discovering certain evidence was underway, he would have even less reason to eschew unlawful means of obtaining the same evidence—since he could be more confident that the prosecution later would be able to "prove" that the evidence would have been discovered anyway by means of the ongoing lawful investigation. And if the officer was not aware of the ongoing lawful investigation, it could not affect his conduct at all.

C. Finally, even if one assumed for purposes of argument that the petitioner's "independent inevitable discovery" exception was constitutionally more acceptable than a more general hypothetical-probable-discovery exception, it would not apply to the facts of this case. Under the petitioner's own rationale, his "narrow" exception can apply only if it is clear that an independent, legal investigation in fact was proceeding toward discovery of the evidence in question; speculation will not be reduced if all that is known is that some investigation was underway, with no assurance that it was headed toward the right place.¹⁴ Apparently recognizing this point, the petitioner characterizes the record as showing that a search for the victim's body that had been undertaken by the Iowa Bureau of Criminal Investigation (BCI) was proceeding inexorably toward discovery of the body when Williams, at Leaming's behest, led the police to it. (Pet. Br. at 12). The problem with this characterization is that it simply is incorrect, as a closer examination of the petitioner's misleading assertions demonstrate:

1. The petitioner cites to testimony given in the 1977 suppression hearing by the BCI agent in charge of the search, Thomas Ruxlow, for the proposition that the police theorized that the body "may have been disposed of along Interstate 80 somewhere between Grinnell and Des Moines" (Pet. Br. 12, citing App. 33), and asserts that Ruxlow, "directing 200 volunteers in a thorough, painstaking search in central Iowa, was on the verge of discovering the body. . . ." (*Id.*) In order for these assertions to have any relevance to the petitioner's "independent inevitable discovery" theory, they must be intended to create the impression that it was clear that the BCI search was planned for the entire area of "central Iowa" between Grinnell and Des Moines, including the portion of Polk County in which the body was located. However, the record flatly contradicts this impression:

¹⁴ Even when it is clear that an ongoing investigation was headed in the right direction, it will still be speculative whether it would have succeeded—as the record in this case clearly illustrates, see Division V(B), *infra*.

a. In fact, the portion of the record cited by the petitioner (App. 33) contains no testimony by Ruxlow that the police theorized that the body would be between Grinnell and Des Moines. Ruxlow refers only to Grinnell, and then to explain why the "areas to be searched [were] . . . in Jasper and Poweshiek County" (App. 32)—the next two counties east of Polk County. Moreover, any theory that the body was between Grinnell and Des Moines would have been inconsistent with the fact that the search started in Poweshiek County (App. 33)—more than 90% of which lies *east* of Grinnell.¹⁵

b. Both of the reports filed by the BCI agents involved in the search state that a search was planned for Jasper and Poweshiek Counties, with *no* mention of Polk County. (App. 112-121). Moreover, the agents made preparations to search only with regard to Jasper and Poweshiek Counties. (App. 31-33, 144).

c. In noting that "[t]he Ruxlow group . . . had reached a spot only two and one half miles from the culvert where the girl's body rested" (Pet. Br. 12), the petitioner omits the fact that the "spot" that the BCI search reached was the Jasper/Polk County border—i.e., the end of the precise area that Ruxlow had planned and prepared to search. (App. 33-34). Just as the searchers reached this point, at 3:00 p.m., Ruxlow abandoned it to meet Detective Leaming at the Grinnell interchange on Interstate 80. Ruxlow then followed Leaming west on I-80 toward Des Moines, having made no provision for continuing the search in his absence. (App. 33-34, 48, 54-55, 133).

2. The petitioner concludes his discussion of the BCI search with the following sentences:

At a time when discovery of Pamela Powers' body by Ruxlow and his volunteers was imminent, Williams agreed to lead officials to the body. The legal search,

¹⁵ Des Moines is approximately 45 miles *west* of Grinnell.

which the trial court found would have otherwise continued, was terminated.

(Pet. Br. 12). These sentences appear to assert that the BCI search was terminated *after* Williams agreed to lead the police to the body.¹⁶ The record, however, is undisputably to the contrary. It is clear from Leaming's own testimony that when he and Ruxlow left the Grinnell interchange to drive west on I-80, Williams had *not* yet indicated that he would lead the police to the body. *Brewer v. Williams*, 420 U.S. 387, 393 (1977). Moreover, Ruxlow admitted in the District Court proceeding that when he abandoned the search and followed Leaming, he had not been told that Williams would lead the police to the body. (App. 148).

3. The *only* "evidence" in the record that indicates that the BCI *would* have searched in Polk County is Ruxlow's testimony to that effect at the 1977 suppression hearing. (App. 33). But before the hearing, Ruxlow had been told by the prosecution that "they need my maps and my testimony to demonstrate" that his search would have discovered the body (App. 152-153). Moreover, Ruxlow demonstrated a lack of candor at the suppression hearing when he testified that State's Exhibit D (introduced in the District Court as Habeas Ex. 5, App. 108), a photograph taken at the scene in which the body is plainly visible, showed the body "exactly as it was found," without any snow removed. (App. 39). During the proceedings in the District Court, Ruxlow conceded that Exhibit D actually depicted the scene after snow had been trampled down and brushed away from the body (App. 139-140)—a fact which in any event was apparent from Habeas Exhibit 1 (App. 106), a photograph which was uncovered by the respondent's counsel during the pendency of the proceedings in the District Court (App. 104-105), and which shows the body completely covered with snow and brush.

¹⁶ This assertion is made more directly by the United States (U.S. Br. 17-18).

4. In short, any conclusion that the BCI search efforts probably *would* have included the area in which the body was found at best must be based on precisely the kind of *post hoc* rationalization that the petitioner's theory is supposed to avoid. Consequently, even if this Court were to adopt the "independent inevitable discovery" doctrine—which is the only version of the hypothetical-probable-discovery doctrine that the petitioner himself is willing to defend—it would not apply to this case.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT THE EVIDENCE AT ISSUE WAS INADMISSIBLE BECAUSE THE STATE FAILED TO SHOW THAT DETECTIVE LEAMING ACTED IN GOOD FAITH

The Court of Appeals did not reach the issue of the validity of the hypothetical-probable-discovery doctrine. Instead, it held that if any such doctrine could constitutionally exist, it must include a requirement that the prosecution prove that the officer whose unlawful conduct produced the evidence in question acted in good faith; the Court of Appeals then held that the State had failed to prove good faith. 700 F.2d at 1169-73. Of course, preceding Divisions of this Brief have shown that no "good faith" inquiry is necessary in this case, since the hypothetical-probable-discovery doctrine is invalid quite apart from the offending officer's good faith—especially in cases involving the Sixth Amendment right to counsel during "interrogation." In the respondent's view, Division I, *supra*, provides the most direct—and analytically appropriate—basis for decision in this case. At the same time, however, the Court of Appeals' analysis and conclusion also were proper.¹⁷

¹⁷ The decisions of the United States Courts of Appeals that have referred to the "inevitable discovery" doctrine are not inconsistent with the Eighth Circuit's "good faith" analysis in this case. A number of Circuit Court opinions that have discussed "inevitable discovery" have emphasized the issue of the good faith of the officers involved. See *United States v. Bacall*, 443 F.2d 1050, 1057 (9th Cir.), *cert. denied*, 414 U.S. 1004 (1971); *United States v. Bienvenu*, 632 F.2d 910 (1st Cir. 1980); *United States v. Edmons*, 432 F.2d (Cont. next page)

A. If Any Hypothetical-Probable-Discovery Doctrine Were Constitutionally Valid, It Would Have To Include A Good Faith Inquiry

1. In demonstrating the validity of the Court of Appeals' analysis in this case, it will be useful to begin with an examination of two recent decisions of this Court involving the "attenuation" doctrine: *Brown v. Illinois*, 422 U.S. 690 (1975), and *Dunaway v. New York*, 442 U.S. 200 (1979). In both *Brown* and *Dunaway*, this Court held that statements that were obtained from defendants after they were illegally arrested were improperly admitted at trial, even though the statements were preceded by *Miranda* warnings and apparently were voluntary. 422 U.S. at 604-605; 442 U.S. at 218-19. See also *Taylor v. Alabama*, ___ U.S. ___, 102 S.Ct. 2664 (1982).

In *Brown* and *Dunaway* this Court focused on whether the challenged evidence was obtained through *exploitation* of the initial illegality, rather than by lawful means sufficiently attenuated from the illegality to dissipate its taint. This Court articulated three factors to be considered in connection with that question: (1) the "temporal proximity" of the illegality to the evidence; (2) "the presence of intervening circumstances"; (3) "particularly, the purpose and flagrancy of the official misconduct. . . ." (Emphasis added). This Court explicitly noted that "the burden of showing admissibility rests, of course, on the prosecution." 422 U.S. at 603-604.¹⁸

577 (2d Cir. 1970); *Gissendanner v. Wainwright*, 482 F.2d 1293 (5th Cir. 1973); *United States v. Roper*, 681 F.2d 1354 (11th Cir. 1982). See also *United States v. Alvarez-Porras*, 643 F.2d 54, 58-66 (2d Cir. 1981) (rejecting use of "inevitable discovery" doctrine, but emphasizing good faith of officers). Moreover, in those decisions that have not discussed "good faith," the issue simply has not been raised; no circuit court opinion has rejected a good faith inquiry in connection with the "inevitable discovery" doctrine. See also text accompanying nn.6-9, *supra*.

¹⁸ The evidence at issue in this case obviously would be inadmissible under *Brown* and *Dunaway*. The petitioner does not argue to the contrary.

The factor of the "purpose and flagrancy" of the offending officer's conduct—which *Brown* and *Dunaway* identify as being of particular importance—is simply the other side of the coin of "good faith." *Dunaway v. New York*, *supra*, at 221 (Stevens, J., concurring), 226 (Rehnquist, J., dissenting). If a hypothetical-probable-discovery exception to the Sixth Amendment exclusionary rule were to be recognized at all, there would be no less reason to consider "good faith" under that exception than under the "attenuation" doctrine. Indeed, since the emasculating effects on the Sixth Amendment exclusionary rule of the hypothetical-probable-discovery doctrine are potentially far more serious than those of the attenuation doctrine, there is *more* reason to include a good faith inquiry in the former than in the latter.

2. Quite apart from the preceding analogy to the "attenuation" doctrine, from the petitioner's own Fourth Amendment deterrence standpoint, purposeful and flagrant violations of constitutional rights are especially deserving of deterrence. And while good faith is irrelevant to a proper Sixth Amendment analysis, see Division I, *supra*, it might also be said that the admission of the evidentiary fruits of a bad faith violation of the right to counsel would be *especially* destructive of that right.

3. The foregoing does not address whether the good faith of the offending officer is a subjective or objective issue. The Court of Appeals concluded that the question was subjective, 700 F.2d at 1170-71, while the United States argues that the question should be purely objective (U.S. Br. 26-27). The respondent agrees with the United States that any "good faith" inquiry should include an objective "reasonableness" element.¹⁹ At the same time, however, even when a hypothe-

¹⁹ An objective good faith inquiry would be appropriate and necessary because restricting the good faith issue to the subjective state of mind of the officer effectively would reward untrained and unreasonable officers, and would encourage violations of constitutional rights in the hope that the courts could be persuaded that the officer *believed*, however unreasonably, that his conduct was constitutional.

tical reasonable officer could have believed that certain conduct was lawful, there would be no reason to allow into evidence the fruits of that conduct when the actual officer in question subjectively—and correctly—believed he was acting unlawfully.²⁰

In any event, whether the good faith issue is objective or subjective (or both) does not matter in this case: As the Court of Appeals' careful analysis of the record demonstrates, 700 F.2d at 1171-1173 (Pet. A13-A17), its conclusion that the State failed to show that Detective Leaming acted in good faith was correct, regardless of whether good faith is a subjective or objective issue.

B. The State Failed To Show That Detective Leaming Acted In "Good Faith" When He Purposefully Sought To Obtain Information About The Body Before Respondent Could Reach His Attorney

1. This Court previously has found that Detective Leaming made an agreement with the respondent's attorney, Mr. McKnight, that Leaming would bring the respondent straight back to Des Moines from Davenport without questioning him, 430 U.S. at 391, 410, 415. Albeit only in footnotes, the petitioner (Pet. Br. 27, n.26) and the United States (U.S. Br. 6-7, n.3) attempt to dispute the existence of that agreement. The short answer to this attempt of course is that every court that has reviewed this case, including both this Court (430 U.S. at 391) and the state trial court that presided over the 1969 suppression hearing (*Brewer App.* at 1), has found that the agreement did exist. But the respondent also would note that the record in

²⁰ As the United States suggests (U.S. Br. 12), it is true that in *Harlow v. Fitzgerald*, ___ U.S. ___, 102 S.Ct. 2727 (1982), this Court eliminated the subjective element of the good faith defense in § 1983 cases. However, this holding was based on considerations relating to summary judgment and pre-trial discovery practice in *civil* cases. 102 S.Ct. at 2737-2739. These considerations do not apply to the criminal process, which does not include a summary judgment procedure or pre-trial discovery.

fact contains ample support for the existence of the agreement.²¹

2. In the face of the agreement with McKnight, Leaming admittedly embarked on a purposeful effort to elicit as much information as possible from Williams, particularly about the body, before Williams could reach his attorney. 430 U.S. at 399. It is hard to imagine a more flagrant or purposeful violation of the right to counsel: Surely any police officer would (or at least should) realize that he is not permitted to elicit incriminating information from a defendant against whom formal

²¹ The agreement arose during a meeting between McKnight, Leaming, and Des Moines Police Chief Wendell Nichols (*Brewer App.* at 37-38). At the 1969 suppression hearing, Nichols testified that it was his "understanding when Mr. Leaming left that they were going straight to Davenport and bring [Williams] straight back." (*Brewer App.* at 38). Moreover, Nichols conceded that when McKnight later said to Nichols, "I bet you they're questioning Williams and going to stop on the way somewhere to try to discover the body," Nichols "may have" responded that "I hope they don't because we agreed that we would come straight back." (*Brewer App.* at 39). Leaming's own testimony at the 1969 suppression hearing included the following exchanges with McKnight:

Q: Did you say to me, "We are going to Davenport and bring Mr. Williams straight back to Des Moines and you all wait here."

A: No sir, not just like that.

* * *

Q: Now obviously, officer, you had some conversation with me about that any conversation with Mr. Williams would be taken when you got back in your office; don't you remember that?

A: We had some similar conversation of that, but not just like that, no.

Brewer App. at 64 (emphasis added).

Especially given the state trial court's explicit doubts about Leaming's candor concerning the agreement (*Brewer App.* at 2), the foregoing responses by Nichols and Leaming provide ample support for that court's finding that there was an agreement (*Brewer App.* at 1). Moreover, it was apparent from McKnight's leading questions that McKnight—who was the only other witness to the relevant conversations—was asserting that there was an agreement. In short, with all due respect to Professor Kamisar, his conclusion that the only support in the record for "the agreement" was the officers' silent acquiescence to what McKnight told Williams, see *Foreword: Brewer v. Williams—A Hard Look at a Discomfiting Record*, 66 *Geo. L.J.* 209, 212-213 (1977), is simply incorrect.

judicial proceedings have been commenced before he can reach his attorney—especially when the officer has agreed with the attorney not to question the defendant. In short, “[t]his is not a case where, in Justice Cardozo’s words, ‘the constable . . . blundered, . . . ; rather, it is one where the ‘constable’ planned an impermissible interference with the right to the assistance of counsel.” *United States v. Henry*, 447 U.S. 264, 274-75 (1980).²²

3. The state seeks to justify Leaming’s conduct in part by arguing that “Leaming was careful not to *directly* ask Williams questions.” (Pet. Br. 26) (emphasis added). But the fact that Leaming did not “directly” ask any questions, apparently in the sense of making any statements with question-marks at the end, does not make any difference for constitutional—or good faith—purposes. For one thing, Leaming’s purposeful attempt to elicit information about the body included the following portions of his “Christian burial speech”:

I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl that was snatched away from them on Christmas [E]ve and murdered. And I feel *we should stop and locate it on the way in [to Des Moines]* rather than waiting until morning. . . .

430 U.S. at 393 (emphasis added). Certainly Leaming could not reasonably have thought that *stating* that “we should stop and locate [the body] on the way in” was any different from asking, “Will you show me where the body is on the way in?”

Moreover, whether or not he “directly” asked questions, Leaming’s conduct was constitutionally indistinguishable from

²² In its brief in *Brewer v. Williams* (pp. 33-35), even the State conceded that Leaming’s conduct involved “trickery and deceit.” In this regard, it is worth remembering that Leaming’s “Christian Burial Speech” obviously was designed to play on the sympathies of the respondent, who Leaming knew to be a “young man with quixotic religious convictions and a history of mental disorders,” 430 U.S. at 412, in a manner that would not have been feasible in the presence of counsel.

that involved in *Massiah v. United States*, 377 U.S. 201 (1964). *Brewer v. Williams*, *supra*, 430 U.S. at 400. *Massiah* did not refer to any questioning by government agents, and held that the defendant's Sixth Amendment rights were violated when the government introduced at trial statements "which federal agents had deliberately *elicited* from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206 (emphasis added). Clearly, Leaming's purpose was to *elicit* information about the body in the absence of Williams' attorney.

4. The petitioner also argues that Leaming could not reasonably have known that his conduct was "clearly unconstitutional" because the defendant in *Massiah* did not know that the person to whom he divulged incriminating information was a government agent. (Pet. Br. 28). This argument seems to be premised on the view that "bad faith" depends on the existence of a prior decision by this Court that is not factually distinguishable in any respect—even a respect that is constitutionally irrelevant. But even if one accepts this premise, the petitioner's *Massiah* argument is without merit, since it ignores *McLeod v. Ohio*, 381 U.S. 356 (1965), in which this Court held that a confession was invalid under *Massiah* even though the defendant plainly was aware that he was speaking to police officers. *See Brewer v. Williams*, *supra*, 430 U.S. at 400.

5. The United States suggests that the fact that Leaming was "hoping to find out where the little girl was" does not imply bad faith because she had been missing for "only" two days, and "the police could not be certain she was dead." (U.S. Br. at 30). But quite apart from whether a partially humanitarian motive on Leaming's part would have been relevant to the constitutional admissibility of the evidence in question, the United States' suggestion is contradicted by the record. Not only is there no evidence that Leaming hoped to find the victim alive, *see Williams v. Nix*, *supra*, 700 F.2d at 1172, but Leaming himself testified that he knew she was dead. (*Brewer App.* at 96-97).

6. The final "good faith" argument by the United States is that "there is an important difference between an intent to elicit information—an activity central to good police work—and an intent to elicit information with knowledge that to do so would violate the suspect's constitutional rights." (U.S. Br. at 30). On its face, this assertion is true enough. However, it ignores the fact that Leaming's admitted intent was not simply to elicit information, but rather to elicit as much information as possible *before Williams reached his attorney*—in violation of an agreement with that attorney. 430 U.S. at 399. It is this admitted relationship between Leaming's purpose and Williams' attorney that makes it clear that Leaming could not reasonably have thought that his conduct was lawful.²³

C. The State Had Adequate Notice Of The Good Faith Issue

In Division II(B) of its Argument, the State complains that it did not have notice of the good faith issue in the District Court, and therefore had no opportunity to litigate that issue. This complaint is without merit, since the State in fact had ample notice of the good faith issue—and even argued it on the merits—throughout the proceedings in the District Court and the Court of Appeals:

1. Prior to the filing of the petition for a writ of habeas corpus in the District Court, the Iowa Supreme Court identified "good faith" as an element in its "hypothetical inevitable discovery" doctrine on which the State had the burden of proof. 285 N.W.2d at 260.

²³ As the Court of Appeals noted, 700 F.2d at 1170 (Pet. at A11-A12), the theory espoused by the State (Pet. Br. at 31) and the Iowa Supreme Court (285 N.W.2d at 260) that Leaming acted in good faith simply because a substantial percentage of the judges and justices who ruled on the validity of the first conviction would not have reversed that conviction is wholly without merit. The fact that judges disagree on the constitutional propriety of police conduct does not *per se* make it legally reasonable or proper. See, e.g., *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Coolidge v. New Hampshire*, 403 U.S. 433 (1971).

2. The respondent's initial memorandum in the District Court raised the lack-of-good faith element of the Iowa Supreme Court's hypothetical inevitable discovery test. (App. 175). Moreover, in urging that this Court's decision in *Brown v. Illinois*, 422 U.S. 590 (1975), required reversal of the Iowa Supreme Court's inevitable discovery decision, the respondent argued in the District Court that Learning's conduct was a flagrant violation of his rights. (App. 175-76). Since "flagrancy" is simply the opposite of "good faith," *Dunaway v. New York*, 442 U.S. 200, 221, 226 (1979), *State v. Williams*, 285 N.W.2d 248, 259 (Ia. 1979), this argument certainly gave notice that Learning's lack of good faith was an issue.²⁴

3. The State explicitly dealt with the "good faith" issue in its initial brief in the District Court, arguing that Detective Learning did act in "good faith." (App. 179-81).

4. Although Williams' opening brief in the Court of Appeals argued that Detective Learning did not act in good faith (App. 184), the State at no time complained that it had not received notice of that issue in the District Court. Instead, the State's Brief in the Court of Appeals directly addressed the "good faith" issue on its merits (App. 186-89). Moreover, at oral argument counsel for the State explicitly and repeatedly took the position that the State *should* have the burden of establishing good faith, and that the State had done so. 700 F.2d at 1169, n.5, 1174-1175 (Pet. at A10, n.5, A24-A26).

²⁴ The State goes to great lengths to argue that the respondent's *Brown v. Illinois* "flagrancy" argument in the District Court did not give notice of the good faith issue because that argument was not repeated in a later section concerning the application of the Iowa Supreme Court's hypothetical-probable-discovery doctrine: (Pet. Br. at 33, n.36). While the respondent might defend the absence of such repetition on the ground that it would only have made already-lengthy (86 legal pages) briefing even more unwieldy, he is willing to concede that his District Court advocacy would have been more effective with the repetition suggested by the State. Nevertheless, this purely organizational point does not change either the fact that the respondent's District Court briefing did give notice that Learning's good faith was an issue, or the fact that the State actually addressed that issue on the merits in both the District Court and the Court of Appeals.

5. In sum, the State had ample notice that Leaming's good faith was an issue, and consistently pursued the strategy in the District Court and the Court of Appeals of arguing that good faith was established on the record before the courts.²⁵

6. Finally, it should be noted that an opportunity to present evidence on good faith is necessary only if good faith is an issue. As this Brief previously has demonstrated, especially in the Sixth Amendment right-to-counsel context, good faith is not an issue because the hypothetical-probable-discovery doctrine itself is invalid.

**V. EVEN UNDER THE BROADEST POSSIBLE
HYPOTHETICAL-PROBABLE-DISCOVERY DOC-
TRINE, THE EVIDENCE AT ISSUE IN THIS CASE
WOULD NOT BE ADMISSIBLE**

This brief has shown that the hypothetical-probable-discovery doctrine, in any form, is inconsistent with the Sixth Amendment right to counsel involved in this case, and that effectuation of that right required exclusion of the evidence at issue from the respondent's trial. Moreover, this brief has demonstrated that even if the petitioner's "independent inevitable discovery" doctrine and the Iowa Supreme Court's "good faith inevitable discovery" doctrine were valid, neither of them would render the evidence in this case admissible. This Division of the Argument will show that even under the broadest possible version of the hypothetical-probable-discovery doctrine, the evidence still would not be admissible, since the State failed to show that the evidence probably would have been discovered in the absence of the violation of the respondent's right to counsel.

²⁵ As the United States recognizes (U.S. Br. at 30-31 n.13), even if there were any substance to the State's opportunity-to-present-evidence argument, it would apply only to the issue of subjective good faith—and not to the issue of *objective* good faith, which both parties agree must be established if good faith is to be an issue at all. Moreover, even with regard to subjective good faith, the State suggests no additional evidence that it might offer on remand.

In concluding that the victim's body, and the evidence connected therewith, probably would have been discovered "in any event," the Iowa Supreme Court found (A) that an organized search for the victim would have extended into the area of Polk County where the body was found, and (B) that the searchers would have seen the body because it was "highly visible. 285 N.W.2d at 262, Pet. A48-A49. Even under a "preponderance of the evidence" standard,²⁶ however, neither of these conclusions was correct in light of the record developed in the District Court.

A. Division III(C), *supra*, has already discussed in some detail the record in this case concerning the organized search for the victim's body. That discussion shows that the reports of the Iowa BCI agents who were in charge of the search reflected that the search was only planned for Poweshiek and Jasper Counties, and that the agents made preparations to search only in those counties. Moreover, the agents abandoned the search at 3:00 p.m., just as it reached the Jasper/Polk County border—the end of the planned search area—in order to follow Detective Leaming west on Interstate 80, having made no provisions for continuing the search into Polk County, where the body was located. At that time, the respondent had not indicated that he would take Leaming to the body.

²⁶ Given the Sixth Amendment context of this case, the "preponderance" burden used by the Iowa Supreme Court was inconsistent with *United States v. Wade*, 388 U.S. 218 (1967), which held that when a witness identifies a defendant at a post-indictment line-up in the absence of the defendant's counsel, the government must show that any subsequent in-court identification in fact was independent of the pre-trial identification, by clear and convincing evidence. Since the "inevitable discovery" doctrine at best involves more speculation, and is potentially more destructive of the functions of the Sixth Amendment right to counsel, than the "independent source" and "attenuation" doctrines referred to in *Wade*, the holding in *Wade* requires, *a fortiori*, that if any "inevitable discovery" doctrine is to be applied here, the State must show that the hypothetical discovery would have occurred by clear and convincing evidence. However, this is an issue that need not be reached in this case in light of the analysis that follows.

In finding that the BCI search eventually would have been resumed and continued into Polk County, the Iowa Supreme Court relied entirely on Agent Ruxlow's testimony to that effect. 285 N.W.2d at 262, Pet. A48. However, unbeknownst to that court, Ruxlow had been told by the prosecution that the purpose of his testimony was to show that the body would have been discovered, and Ruxlow had testified falsely about a highly material photograph of the body. Moreover, the facts discussed in the preceding paragraph belie Ruxlow's testimony.

Obviously, if Ruxlow had intended to continue the search into Polk County, it would not have made sense for him to abandon the search to follow Leaming, for no known purpose, when there were still two hours of daylight left and a group of searchers was already organized and available. Especially in light of all the other circumstances, including Ruxlow and Mayer's BCI reports, the fact that Ruxlow and Mayer left Grinnell precisely at the time that the search of Jasper County was being concluded is too "neat" a coincidence to be explainable on any other basis than that their continuing intent was to search only Poweshiek and Jasper Counties. And the explanation that the search would have been resumed if Williams had not led the police to the body is not credible given that the search was abandoned *before* Williams indicated he would do so. Certainly the prosecution did not meet *its* burden of showing, even by a preponderance of the evidence, that the search would have continued into Polk County.

B. Even if the search *had* extended into Polk County, the record demonstrates that the searchers would not have found the body, for two main reasons:

1. Even if the searchers had left their vehicles to search on foot, they would not have seen the body, which was completely hidden under a cover of snow and brush. This conclusion is supported not only by Habeas Exhibit 1 (App. 106), but by the difficulty the police had in locating the body even after Williams led them to where it was located (App. 95-96).

In finding that the body *would* have been visible to the searchers, the Iowa Supreme Court relied on the only two photographic exhibits then in the record, Habeas Exhibits 3 and 5 (App. 107, 108), which that court believed showed the body as it appeared when the police first discovered it with Williams' help:

The State also introduced photographs showing the body as it was *actually found*. These photographs show that Pamela Power's body would not have been hidden by the inch of snow which accumulated in the area in the evening of December 26 . . . In addition the left leg of the body was poised midair, where it would not have been readily covered by a subsequent snowfall.

State v. Williams, supra, 285 N.W.2d at 262, Pet. A48-49 (emphasis added). The court apparently based this belief on Ruxlow's testimony at the suppression hearing that Exhibit 5 showed the body exactly as it was found. (App. 39).²⁷

However, additional evidence introduced in the District Court established beyond question that Exhibits 3 and 5 did *not* show the body as it was found, and thus that the Iowa Supreme Court's belief was incorrect. In the habeas corpus proceeding, Ruxlow conceded that Exhibit 5 was taken after the scene had been altered and snow had been removed. (App. 139-40). Quite apart from this concession, Exhibit 1—which was not available to the defense in the state court proceedings (App. 98-101, 103-105)—demonstrated clearly that Exhibit 5 could not possibly show the body as it was found: While Exhibit 5 shows the body almost completely exposed to view, Exhibit 1 shows the body completely covered with a blanket of snow and obscured by brush. (App. 106, 108).²⁸

²⁷ Mr. Ruxlow's suppression testimony refers to State's Exhibits C and D. These were introduced in the District Court as Petitioner's Exhibits 3 and 5 (App. 107, 108).

²⁸ The record also demonstrates that Exhibit 3 (Ex. C at the 1977 suppression hearing; App. 102)—on which the District Court apparently relied in concluding that the victim's "face and part of her brightly colored shirt" were not covered by snow, Pet. at A80—did not show the body as it was found. (Cont. next page)

2. The preceding paragraphs show that it is unlikely the body would have been discovered even *assuming* that searchers would have exited their vehicles at the spot where the body was located. The record shows, however, that even this assumption is unwarranted. Ruxlow testified that the searchers generally searched from their vehicles; if they saw a "culvert or any out-building of an abandoned farm," they were supposed to get out of their cars. (App. 44-45, 50-51). Habeas Exhibits 7, 8 and 9 (App. 109-111) were photographs taken from the road approaching the culvert where the body was located. Although all of these photographs include the location of the culvert, it is not visible in any of them. The searchers therefore would not have left their cars to search, and would not have found the body even if it had been more visible than Exhibit 1 shows it was.

C. Since the conclusion that the State did not demonstrate that the body would have been discovered in the absence of the violation of Williams' constitutional rights is contrary to that reached by the Iowa Supreme Court, some brief attention to 28 U.S.C. § 2254(d) is appropriate. Normally, state court factual findings are entitled to a presumption of correctness in a federal habeas corpus proceeding. 28 U.S.C. § 2254(d); *Sumner v. Mata*, 449 U.S. 539 (1981). However, this presumption of correctness does not apply when "the material facts were not adequately developed at the state court hearing" or when the petitioner "did not receive a full, fair and adequate hearing in the state court proceeding . . ." 28 U.S.C. § 2254(d)(3), (6); *Townsend v. Sain*, 372 U.S. 293 (1963).

Given the additional evidence presented in the District Court, both of these exceptions apply. Habeas Exhibit 1 (App. 106) and Ruxlow's habeas testimony made it clear that the

After the body was found, a police officer took a single initial photograph of the body as it then appeared. After this first photograph was taken, the body was moved and the scene was altered. (App. 124). Exhibit 1, in which the body is virtually indiscernible, must be the single initial photograph. Thus, Exhibit 3 must have been taken after the scene had been disturbed.

Iowa Supreme Court had relied on false and highly misleading testimony in finding that the body was visible. Moreover, Ruxlow's false testimony at the suppression hearing concerning Habeas Exhibit 5 (App. 108)—which was disclosed for the first time in the District Court—reflected on his credibility on other matters, including the intended scope of the search effort. Finally, the state courts were not presented with Habeas Exhibits 7-9, 11, 12, or 16 (App. 109-122, 126-170)—all of which indicated that the victim's body would not have been found.

VI. *STONE V. POWELL* DOES NOT PRECLUDE REVIEW ON THE MERITS IN THIS CASE

The petitioner and one of his *amici* argue that this Court should extend the reach of *Stone v. Powell*, 428 U.S. 465 (1976), from Fourth Amendment cases to Sixth Amendment cases such as this one, so as to preclude review on the merits. (Pet. Br. 35-40; Ill. Br. 4-12). This argument should be rejected for three independently sufficient reasons: (A) Extension of *Stone v. Powell* to this case would be inconsistent with Sixth Amendment right to counsel; (B) *Stone v. Powell* should not be applied to cases in which the underlying state court decision is based on a new exception to the exclusionary rule; and (C) the respondent did not have a full and fair opportunity to litigate the merits in state court.

A. For reasons that are closely related to the reasons why a hypothetical-probable-discovery doctrine could not be constitutionally applied in this case, the holding and rationale of *Stone v. Powell*, *supra*, do not apply to this case because it involves a violation of the Sixth Amendment right to counsel during post-initiation interrogation.

1. In *Stone v. Powell*, this Court held that a state prisoner who had been afforded a full and fair opportunity to litigate Fourth Amendment exclusionary-rule claims in the state courts could not relitigate those claims in a federal habeas corpus proceeding. This holding was carefully limited to its Fourth Amendment context. Thus, this Court emphasized

that its decision was "not concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally," 428 U.S. at 493-494, n.97, and based its entire analysis on the "nature and purpose of the Fourth Amendment exclusionary rule" *Id.* at 481, 482-495. The *Stone* opinion specifically noted the very limited role of the "imperative of judicial integrity" in Fourth Amendment exclusionary rule cases, *id.* at 484-85, and made it clear that the Fourth Amendment exclusionary rule "is not a personal constitutional right" that is calculated to redress injury to any particular defendant in relation to the criminal judicial process. Rather, "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect" *Id.* at 486, quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974). Given this primarily deterrent purpose of the Fourth Amendment exclusionary rule, permitting relitigation of Fourth Amendment claims in a federal habeas corpus proceeding after a full and fair opportunity to litigate those claims in state court is not justified because the incremental deterrent effect of doing so, if any, would be too slight to outweigh the resulting social costs. 428 U.S. at 493.

2. As Division I of the Argument, *supra*, has already demonstrated, the deterrence/balancing analysis on which *Stone* is based is not applicable to cases involving violations of the Sixth Amendment right to counsel. Unlike the Fourth Amendment's prohibition against unreasonable searches and seizures, which is designed to protect rights wholly outside the criminal trial process, the right to counsel, even at a critical *pre-trial* stage such as interrogation, is designed to protect the personal right of each defendant to a fair trial, and the Sixth Amendment "exclusionary rule" is an integral and indispensable aspect of that right. When evidence obtained in violation of a defendant's right to have counsel during interrogation is admitted at trial, that defendant's personal constitutional rights are violated, and the judicial process by which that defendant is convicted is rendered unfair and unconstitutional. Consequently, *Stone's* deterrence/balancing rationale is inapplica-

ble to Sixth Amendment right-to-counsel violations, and federal habeas corpus remains available to remedy such violations. Schulhofer, *Confessions and the Court*, 79 Mich. L. Rev. 861, 889-90 (1981); see also *United States v. Henry*, 447 U.S. 264 (1980).

3. The petitioner's argument for the extension of *Stone v. Powell*, *supra*, to the instant case is premised on the assertion that the rationale of *Stone* applies whenever the issue is the admission of "highly probative reliable physical evidence," apparently because the police "will be adequately deterred by the possibility of losing convictions on direct appeal." The petitioner suggests that Fifth and Sixth Amendment violations differ from Fourth Amendment violations only in that they "are generally not linked with highly probative and reliable physical evidence," and that the applicability of *Stone* should turn on "the nature of the evidence gathered, not the type of constitutional violation which occurred." (Pet. Br. 36-37). This argument is flawed in several independently fatal respects:

a. First, and most importantly, in focusing exclusively on the deterrent purposes of the exclusionary rule, and in suggesting that Sixth Amendment violations differ from Fourth Amendment violations only in terms of the kind of evidence they "generally" produce, the petitioner ignores the consequences of the fundamental non-deterrent purposes of the Sixth Amendment exclusionary rule just discussed above.

b. Second, the petitioner's argument depends on the notion that if evidence that is obtained as a result of a violation of a defendant's right to counsel is "probative" and "reliable," admission of that evidence does not affect the fairness or integrity of the trial. (Pet. Br. 34-38). The problem is that this notion is simply incorrect: The right, following the initiation of formal adversary proceedings, to have the assistance of counsel during attempts by the police to elicit information from the defendant for use at trial is aimed at protecting the defendant from providing such information without the advice of a skilled representative who can evaluate the impact of doing so on the

trial process—whether or not the information is “probative” or “reliable.” *Brewer v. Williams*, 430 U.S. 387 (1977); *Massiah v. United States*, 377 U.S. 201 (1964); *United States v. Henry*, 447 U.S. 264 (1980).

C. Finally, the petitioner’s underlying premise that habeas corpus review is precluded whenever the claimed constitutional error has had no impact on the reliability or accuracy of fact finding is directly contradicted by this Court’s holding in *Rose v. Mitchell*, 443 U.S. 545 (1979). In *Rose*, this Court reviewed claims by state prisoners that their convictions were invalid because of racial discrimination in the selection of grand jury foremen. These claims did not in any way implicate the reliability of the fact-finding processes (i.e., the trials) by which the defendants had been found guilty. Nevertheless, the Court declined to extend *Stone* beyond its “limited reach,” noting (*inter alia*) (a) that *Rose* involved claims of violations of personal rights, and (b) that the judicial integrity concerns and constitutional interests were more compelling than in *Stone* because the claimed violations struck at “core concerns of the Fourteenth Amendment and at fundamental values of our society and our legal system.” 443 U.S. at 560, 563, 564. While *Rose* is of course different from this case in the sense that it does not involve the admissibility of evidence, it nevertheless makes it clear that an attack on the reliability of the fact-finding aspects of the criminal process is not a *sine qua non* of federal habeas corpus review.²⁹

4. Both this Court’s narrow Fourth Amendment deterrence analysis in *Stone* —which this Court made clear was not a decision involving the scope of habeas corpus review

²⁹ The respondent would also note that the petitioner’s suggestion that the availability of habeas review should turn on the type of evidence in question would be unworkable as a practical matter. For example, how would a federal court decide whether evidence was “highly” probative or “reliable”? At best, the habeas court would have to engage in a wide-ranging review of the entire record relative to the defendant’s guilt, with only the vaguest of standards to guide it.

generally—and this Court's holding in *Rose v. Mitchell*, *supra*, reflect the fact that the central purpose of federal habeas corpus review is to correct constitutional errors in the judicial process by means of which criminal defendants are prosecuted.³⁰ In short, the focus of habeas corpus review is on the legality of the governmental process by which the prisoner's confinement was produced, not on the defendant's guilt or innocence. See *Rogers v. Richmond*, 365 U.S. 534, 541-46 (1961); Boyte, *Federal Habeas Corpus After Stone v. Powell: A Remedy Only for the Arguably Innocent?*, 11 U. Rich. L. Rev. 291, 321-330 (1977). As the preceding paragraphs demonstrate, a claim that the defendant's Sixth Amendment right to counsel during interrogation was violated is precisely the sort of challenge to the legality of the process leading to conviction that is within the scope of habeas corpus.³¹

B. Even if this were a Fourth Amendment case, *Stone v. Powell* would not apply, because the decision of the Iowa Supreme Court was based on a previously unrecognized exception to the exclusionary rule that would have a serious negative impact on that rule's deterrent effect.

³⁰ The *Stone* opinion's analysis of the historical development of federal habeas corpus review of state convictions shows that such review at first was restricted to the "jurisdiction" of the sentencing court. 428 U.S. at 475. Of course, the scope of habeas corpus review subsequently was expanded to include other challenges to the constitutionality of the process leading to conviction. See, e.g., *Brown v. Allen*, 344 U.S. 443, 482-87 (1953). But even then, habeas corpus was not available to review claims that newly discovered evidence showed that the defendant was innocent. *Townsend v. Sain*, 372 U.S. 293, 317 (1963).

³¹ Consistently with the analysis above, every federal circuit court faced with the issue has declined to extend *Stone v. Powell* to Fifth and Sixth Amendment claims. See *White v. Finkbeiner*, 687 F.2d 885 (7th Cir. 1982); *Hinman v. McCarthy*, 676 F.2d 343, 348-49 (9th Cir.), *cert. denied*, 103 S.Ct. 468 (1982); *Patterson v. Warden*, 624 F.2d 69, 70 (9th Cir. 1980); *Harryman v. Estelle*, 616 F.2d 870, 872 (5th Cir.), *cert. denied*, 449 U.S. 860 (1980); *Morgan v. Hall*, 569 F.2d 1161, 1168-69 (1st Cir.), *cert. denied*, 437 U.S. 910 (1978).

1. In *Stone*, the defendants claimed that the state courts had misapplied established Fourth Amendment doctrine to the facts of their respective case; no claim was made that the state courts had established new rules of law that were inconsistent with this Court's decisions or the Fourth Amendment. As the holding in *Stone* indicates, federal habeas corpus review of claims that the state courts have misapplied established Fourth Amendment doctrine in particular fact contexts would not significantly promote the deterrent function of the Fourth Amendment exclusionary rule. For one thing, a police officer who is contemplating conduct that would violate the Fourth Amendment would be unlikely to be deterred by the speculative prospect that the state courts would misapply Fourth Amendment doctrine to that conduct, but that a federal court would later correct the mistake. In addition, a state court's incorrect application of Fourth Amendment doctrine to the particular facts of any given case is unlikely to encourage misconduct by police officers in future cases, since the factual contexts of search-and-seizure cases tend to be so varied as to make each of them *sui generis*.

2. The decision of the Iowa Supreme Court in this case was of a very different sort from the state court decisions involved in *Stone v. Powell*. The Iowa court's holding was based, not on accepted Sixth Amendment doctrine, but on a broad new exception to the exclusionary rule that neither that court nor this Court previously had recognized. 285 N.W. 2d at 255-260, Pet. A35-A45. As Division II, *supra*, has demonstrated, if this new exception to the exclusionary rule were allowed to stand, it would provide a significant incentive for police misconduct in the future. Hence, this case, unlike *Stone*, is one in which precluding federal habeas corpus review—and correction—of the state court's decision would result in serious harm to the deterrent effect of the exclusionary rule in the future. Given this fact, the rationale of *Stone* would not apply here even if this were a Fourth Amendment/deterrence case.

C. Under *Stone v. Powell*, federal habeas corpus review of Fourth Amendment claims is barred only if the defendant has

- had a "full and fair" opportunity to litigate those claims in the state courts. 428 U.S. at 481-82. With regard to the hypothetical-probable-discovery issue in this case, the respondent did not have such an opportunity. As Division IV, *supra*, has discussed in some detail, additional evidence presented in the District Court demonstrated that the Iowa Supreme Court, in concluding that the State had shown the body more likely than not would have been discovered "in any event," relied on testimony that was false and seriously misleading. Especially since it was the State that was responsible for the Iowa Supreme Court's misapprehension of the facts, it cannot be said that the respondent had a full and fair opportunity to litigate the suppression issue.³² Consequently, whether *Stone* should be extended beyond its Fourth Amendment context in this case is a moot issue which this Court need not decide.

D. Notwithstanding the sufficiency of the points just made above, the assertion made by *amicus curiae* State of Illinois in connection with the *Stone v. Powell* issue that "Respondent's guilt was not in question" (Ill Br. at 11) warrants some response, in light of its complete inaccuracy. While the Respondent's guilt may not have seemed to be in question when this case first reached this Court, *see* 430 U.S. at 428, 437, 441, it most certainly *is* in question now. As the Court of Appeals noted, 700 F.2d at 1168, Pet. at A7-A8, the respondent's defense at the second trial—that someone else killed the victim and placed her body in his room—was supported by substantial physical evidence indicating that the perpetrator, unlike the respondent, was sterile. Moreover, other evidence that inexplicably was not presented by defense counsel at trial, but which was presented to the District Court in this proceeding

³² The fact that the state trial judge who heard the motion to suppress expected to be reversed on appeal, apparently because of what he regarded as the less-than-adequate record made by the prosecution (App. 173), also is relevant to the "full and fair opportunity" issue.

with reference to one of the issues not addressed by the Court of Appeals, also strongly supported the respondent's defense.³³

CONCLUSION

The evidence at issue in this case was obtained as a direct result of Detective Leaming's purposeful violation of the respondent's Sixth Amendment right to counsel, and was precisely the sort of evidence that Leaming sought. Consequently, this case is constitutionally indistinguishable from its predecessor, *Brewer v. Williams, supra*. This result cannot be altered by reference to any hypothetical-probable-discovery doctrine. Even if one assumed, albeit incorrectly,

³³ That evidence consisted of the pre-trial deposition testimony of Richard Boucher, who was a resident of the Des Moines YMCA on the day of the crime. At about the time of the crime, Mr. Boucher heard suspicious belligerent noises from the room next to his; he recognized the voice of Albert Bowers, a maintenance man who was responsible for cleaning restrooms and residence rooms at the YMCA. Mr. Boucher later saw Bowers taking suitcases into his room, and then heard sounds of packing. When Mr. Boucher and a police officer went to Bowers' room to ask him not to leave, Bowers indicated he was not going anywhere. However, his bags were hidden under his bed, and he left the YMCA shortly thereafter. Boucher subsequently found a towel in Bowers' room that appeared to have bloodstains on it. (Iowa Supreme Court Appendix, also introduced in the District Court, at 153-174).

Incredibly, the Boucher testimony was not offered at trial. In his Reply to the Brief in Opposition, the petitioner suggests that this was because "the State exhumed the body of Bowers and was prepared to offer medical testimony that Bowers was virile [sic]." (Reply at 4, n.2). But quite apart from the fact that it was the *defense* that exhumed Bowers' body—and then volunteered the results of its expert's sterility test to the prosecution—Bowers' apparent nonsterility does not affect the relevance of the Boucher testimony. Of course, if the jury concluded that the perpetrator was sterile, the Boucher testimony would have been of relatively little value—but then the respondent could not have been guilty. On the other hand, if the jury accepted the prosecution's position at trial that the absence of sperm in the semen found on the body was explainable by the annihilation of the sperm by the effects of freezing temperatures—even though that position was inconsistent with its position at the motion to suppress (App. 58-74)—the Boucher testimony would have been powerfully supportive of the respondent's defense.

that the evidence in this case probably *would* have been discovered through lawful means anyway, that hypothetical conclusion would not undo the Sixth Amendment violation that occurred when the evidence in *fact* was obtained through Leaming's misconduct and then used at the respondent's trial. From a more pragmatic perspective, when it really is the case that evidence is discoverable through lawful means, the police can and should *use* those means—rather than violate the Sixth Amendment and then ask the courts to engage in a time-consuming and speculative inquiry into what might have been so that they may have the benefit of the violation.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ROBERT BARTELS

*Court-appointed Counsel
for the Respondent*

NOV 14 1983

ALEXANDER L. STEVENS,
CLERK

No. 82-1651

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

CRISPUS NIX, Warden of the
Iowa State Penitentiary,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF OF THE RESPONDENT

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Iowa State Penitentiary,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF OF THE RESPONDENT

The purpose of this Supplemental Brief is to bring to the Court's attention an important citation that should have been included in the Brief of the Respondent. In Estelle v. Smith, 451 U.S. 454 (1982), this Court held that the presentation of

certain psychiatric testimony at the penalty phase of the defendant's trial violated his Sixth Amendment rights because that testimony resulted from a pre-trial interview with the defendant without notice to his court-appointed counsel that the interview would encompass issues relevant to sentencing. This decision directly supports the respondent's argument that the evidence at issue in this case must be suppressed, without regard to any balancing of "deterrent" effects against social costs of exclusion (see Brief of the Respondent at 5-8). Moreover, because Estelle v. Smith was a \$2254 case, its holding also directly supports the respondent's argument that Stone v. Powell, 428 U.S. 465 (1976), does not apply to this case (see Brief of the Respondent at 35-41).

Respectfully submitted,

ROBERT BARTELS
Counsel for the Respondent

CERTIFICATE OF SERVICE

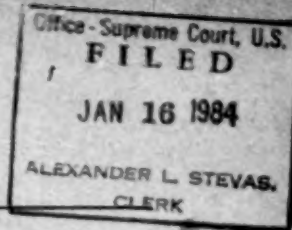
The undersigned hereby certifies that on the 8th day of November, 1983, he deposited three copies of the foregoing document in a United States Post Office mailbox, with postage prepaid, and addressed to counsel for the petitioner:

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ROBERT BARTELS

No. 82-1651



IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

CRISPUS NIX, Warden of the
Iowa State Penitentiary,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

RESPONDENT'S SECOND SUPPLEMENTAL BRIEF

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RESPONDENT'S SECOND SUPPLEMENTAL BRIEF

The respondent submits this supplemental brief pursuant to Rule 35.5 of the Rules of this Court, in order to address intervening matters that were not available in time to have been included in his brief in chief. These intervening matters

consist of new legal and factual issues which were raised for the first time in the Petitioner's Reply Brief, and which the respondent cannot adequately address in the time allotted for oral argument.

I. UNITED STATES V. WADE DOES NOT SUPPORT THE USE OF A DETERRENCE/BALANCING APPROACH IN THIS CASE.

The State's Reply Brief for the first time argues that United States v. Wade, 388 U.S. 218 (1967), supports the use of a balancing/deterrence approach to this case. (Reply Br. at 4-5). This argument is without merit because Wade is a prophylactic rule case, while this case is not.

In Wade, this Court held that when a witness identifies a defendant at a post-initiation lineup without notice to and in the absence of counsel, the government may use that witness's in-court identification of the defendant only if it shows, by clear and convincing evidence, that the in-court identification had a source

independent of the lineup identification. As the petitioner indicates, this Court's analysis in Wade did refer to the deterrence of future police misconduct and to the "attenuation" doctrine articulated in Wong Sun v. United States, 371 U.S. 471, 488 (1963). However, the Sixth Amendment problem addressed in Wade was fundamentally different from the Sixth Amendment problem involved in this case, and consequently Wade's deterrence analysis and holding have no application here.

In Wade, the counsel-less lineup identification was not necessarily the cause of the in-court identification; rather, the in-court identification might well have been the product of the witness's observations during the crime in question. However, because of the inherent possibility that a counsel-less lineup identification might be the cause of an in-court identification, Wade set up

a prophylactic presumption against the admission of the in-court identification in order to deter lineups without counsel -- but still allowed the government to show that the in-court identification was in fact the product of other, legitimate sources. 388 U.S. at 228-241. In short, just as Miranda v. Arizona, 384 U.S. 436 (1966), is a Fifth Amendment prophylactic rule case, Wade is a Sixth Amendment prophylactic rule case. See Halpern, Federal Habeas Corpus and the Mapp Exclusionary Rule After Stone v. Powell, 82 Colum. L. Rev. 1, 38 (1982). Of course, a deterrence/balancing approach is appropriate in such prophylactic rule situations. (See Resp. Br. at 9, n.5).

However, this case is not a prophylactic rule case. While in Wade there was substantial doubt as to whether the counsel-less lineup caused the in-court identification, there is no question in

this case that the evidence at issue in fact was the direct product of Detective Leaming's violation of the respondent's Sixth Amendment rights. Given that fact, a Wade-type prophylactic rule and its underlying deterrence analysis are not applicable here. In short, this case is like Massiah v. United States, 377 U.S. 201 (1964), United States v. Henry, 447 U.S. 264 (1980), Estelle v. Smith, 451 U.S. 454 (1982), and Brewer v. Williams, 430 U.S. 387 (1977) -- none of which involved a prophylactic rule or a deterrence/balancing approach -- and not like United States v. Wade, supra.¹

¹ The petitioner's Reply Brief (pp. 4-5) may be read as implying that the respondent cited Wade as support for his Sixth Amendment analysis. However, this is not the case: The respondent cited Wade only in a footnote dealing briefly with the issue of what burden of proof should be applied if a hypothetical-probable-discovery doctrine was (incorrectly) adopted in the first place. (Rep. Br. at 31, n.26).

II. THE RECORD DOES NOT SUPPORT
THE PETITIONER'S REPLY BRIEF'S
ASSERTIONS WITH REGARD TO
AGENT RUXLOW'S TESTIMONY ABOUT
PHOTOGRAPHIC EXHIBIT D.

In connection with the issue (which this Court should not reach under a proper Sixth Amendment analysis) of whether the body would have been found if Leaming had not violated the respondent's Sixth Amendment rights, the petitioner's Reply Brief raises the argument that Agent Ruxlow did not testify falsely that State Court Exhibit D (Habeas Ex. 5; App. 108) showed the body as it was found, because he actually was referring to State Court Exhibit C (Habeas Ex. 3; App. 107). This argument is supported by one sentence quoted out of context from the record, with a reference to Exhibit C added in brackets. (Reply Br. at 7). But if one considers all of Ruxlow's testimony about Exhibits C and D, the petitioner's interpretation of the record is not reasonably

supportable:

Q: I would like to hand you what has been marked State Exhibit C and ask you what that depicts, if you know?

A: That depicts the position of which the body . . . was discovered on the culvert

Q: To the best of your recollection, at the time that this picture . . . would have been taken, had any snow been brushed away from the face of the child?

A: No.

* * *

Q: I hand you what has been marked State's Exhibit D and ask you if you can tell me what that depicts, if you know?

A: That's the same culvert as in State's Exhibit C. This is taken a little further away, and it shows the . . . body

Q: Has any snow been removed or trampled down as indicated in State's Exhibit D?

A: No. That's exactly the way it was found.

(App. 38-39). The State's argument asks this Court to believe that the prosecution handed Ruxlow Exhibit C; asked him about

the removal of snow in that photograph; then handed Ruxlow Exhibit D; and then asked again about the removal of snow in Exhibit C. This simply is not sensible; and both the state trial court (which actually saw Ruxlow testify) and the Iowa Supreme Court plainly interpreted Ruxlow's second statement about the removal of snow as referring to the Exhibit he had just been handed -- Exhibit D. (App. 86; Pet. at A48, 285 N.W.2d at 262).

III. THE RECORD DOES NOT SUPPORT
THE PETITIONER'S NEW ARGUMENT
CONCERNING THE AGREEMENT NOT
TO INTERROGATE.

Only one point in the Petitioner's Reply Brief regarding the "good faith" issue raises new matter that requires any response. The petitioner now argues for the first time that there is no indication that Leaming himself was a party to the agreement not to question the respondent before he reached his attorney in Des

Moines. (Reply Br. at 11-12). However, contrary to the petitioner's assertion, this Court's opinion in Brewer v. Williams, 430 U.S. 387 (1977), did regard the agreement as having been made with Leaming. For example, this Court stated that "it was agreed between McKnight and the Des Moines police officials" that Leaming and a fellow officer would not question the respondent -- obviously referring to the Des Moines police officials mentioned in the immediately preceding sentences, who included Leaming. 430 U.S. at 391 (emphasis added). Moreover, the evidence in the record in Brewer indicated that Leaming knew of the agreement. (See Brewer App. 37-39, 64). Perhaps most tellingly, the state trial court expressed explicit doubts about Leaming's candor with regard to the agreement (Brewer App. 2); there would have been no reason for the trial court to do so if it had not

concluded that Leaming knew of the agreement.

CONCLUSION

The Petitioner's Reply Brief contains a number of factual assertions and legal arguments, besides those discussed above, that are without merit. However, since these points either do not raise new matter or do not require any response, this brief will not address them.

Respectfully submitted,

ROBERT BARTELS
Counsel for the Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of January, 1984, he deposited three copies of the foregoing document in a United States Post Office mailbox, with postage prepaid, and addressed to counsel for the petitioner:

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ROBERT BARTELS

NO. 82-1651

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In The
Supreme Court of the United States
October Term, 1983

CRISPUS NIX, WARDEN OF THE IOWA STATE
PENITENTIARY,

Petitioner,

vs.

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Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

Petitioner Crispus Nix, Warden of the Iowa State Penitentiary, respectfully submits this Reply Brief on the Merits in the above captioned matter, *cert. granted* 51 U.S. L.W. 3851 (U.S. May 31, 1983) (No. 82-1651).

ARGUMENT

- I. The Respondent Incorrectly Asserts That Adoption Of An Inevitable Discovery Exception To The Exclusionary Rule By This Court Will Provide An Incentive For Police Officers To Act Unlawfully.**

The Respondent claims that this Court's adoption of the widely accepted inevitable discovery exception to the

exclusionary rule will be an incentive for unlawful police conduct. (Resp. Br. at 12, 15, and 17.) This conclusion is inconsistent with the record in this case, defies common sense, and is contradicted by recent experience in the federal courts.

A. Respondent ignores the fundamental fact that the tainted fruits of Leaming's investigative activity—namely, the fact that Williams himself actually led police to the body of Pamela Powers and therefore had personal knowledge of the body's location, has been suppressed. *Brewer v. Williams*, 430 U.S. 387 (1977). Since the State did not purge the taint of Leaming's unlawful activity from this evidence by independent source, attenuation, or inevitable discovery, this highly relevant factual material has been excluded from trial by traditional operation of the exclusionary rule.

Respondent really is arguing that the State must be affirmatively punished for constitutional infractions, however technical in nature. But this Court has never accepted a punishment theory of the exclusionary rule. Rather, this Court has simply sought to put the State in the same position it would have been in if the Constitution had been followed. See *Johnson, The Return of the Christian Burial Speech Case*, 32 Emory L. J. 349, 366 (1983).

Nothing in *New Jersey v. Portash*, 440 U.S. 450 (1979), *United States v. Henry*, 447 U.S. 264 (1980), or *Estelle v. Smith*, 451 U.S. 454 (1981), supports Respondent's punishment theory. These cases simply traditionally apply the exclusionary rule to the direct fruits of illegal conduct where there is no showing of attenuation, independent source, or inevitable discovery.

B. Even if the Court embraces an inevitable discovery exception, common sense tells us that police will be powerfully deterred from unlawful conduct. If a police officer uncovers through unlawful activity evidence that *might* have otherwise been discovered through lawful means, but the State cannot meet its burden of showing that the evidence actually would have been found, the evidence will be excluded. Thus, under the rule advanced by Petitioner, a police officer will be encouraged to adhere closely to legal restrictions in order to avoid the risk of thwarting the investigation. Indeed, the history of this notorious case is a stern reminder of the tremendous risks incurred when police officers engage in investigative conduct later found to be unconstitutional by the courts.

C. The experience of the federal courts with the inevitable discovery exception undermines Respondent's contention that the theory is an incentive for unlawful police behavior and opens the floodgates to intentional use of unconstitutional conduct to bootstrap evidence into the record. If adoption of the inevitable discovery rule in practice had the effects solemnly pronounced by the Respondent, the federal courts, in the common law tradition, would be reacting by cutting back or eliminating the exception altogether. The trend, however, is exactly in the opposite direction. *See* Petitioner's Brief at 18 n. 16.

II. Contrary To Respondent's View, The Core Notion Of Fairness At Trial That Inheres In The Sixth Amendment Right To Assistance Of Counsel Would Not Be Offended By Application Of The Inevitable Discovery Exception In This Case.

Respondent maintains that adoption of the inevitable discovery exception to the exclusionary rule will unconsti-

tutionally invade his right to a fair trial. (Resp. Br. at 5-9.) This contention is without foundation for several reasons.

A. The evidence which the State seeks to admit into evidence—testimony regarding the obvious death of Pamela Powers and the condition of her body—is highly probative and reliable. The evidence establishes, beyond peradventure, that Pamela Powers has indeed been the victim of a brutal murder. It is simply not unfair in a criminal trial to admit into evidence testimony regarding the body of a murder victim which would have been discovered notwithstanding investigative conduct later found to be unconstitutional by the courts.

B. The ability of counsel for Respondent to cross-examine witnesses for the State who testified about the physical condition of the body was not in any sense impaired by application of the inevitable discovery exception. In *United States v. Wade*, 388 U.S. 227 (1967), this Court held the right to counsel does not attach when the state conducts physical examination of a human body. The Court observed that "knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough that the accused has the opportunity to meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts." 388 U.S. at 228.

C. Respondent incorrectly implies that a per se exclusionary rule is necessarily justified when Sixth Amendment infractions occur. (Resp. Br. Part IA at 5, 7, and 8.) But in Respondent's own cited case, *United States*

v. Wade, this Court notes that "[w]here, as here, the admissibility of evidence related to the lineup identification itself is not involved, a *per se* rule of exclusion would be unjustified (citation omitted)." 388 U.S. at 240. Similarly, evidence involved in this case is not that which necessarily flows only from the illegal interrogation itself. As a result, a *per se* exclusionary rule is inappropriate.

Indeed, *Wade* is unmistakable authority for the proposition that *per se* application of the exclusionary rule does not automatically apply simply because Sixth Amendment rights have been found to be violated by the Courts. In a *Wade* type situation, an identification in violation of the right to counsel has occurred which cannot be erased from the mind of the prospective witness. The taint can be purged from the subsequent identification, however, if the prosecution can clearly show independent origins of the identification to be used at trial. In reaching this conclusion, it is instructive to note that the Court cites as persuasive precedent key search and seizure authorities that establish the principle that where there is sufficient means to free evidence from the taint of underlying illegality, society's interests in effective law enforcement outweigh the deterrent purposes of the exclusionary rule. See 388 U.S. at 240-41, citing *Nardone v. United States*, 308 U.S. 338, 341 (1939), *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Respondent's position that deterrence/balancing concepts have no application in Sixth Amendment settings is thus incorrect. (Resp. Br. at 5.)

III. The Factual Findings Of Both State And Federal Trial Courts That The Body Of Pamela Powers Would Have Been Discovered In Any Event Has Ample Support In The Record.

Respondent undertakes the difficult task of penetrating the findings of both state and federal trial courts that the body of Pamela Powers would have been discovered by lawful means. These findings, however, are strongly supported by the evidence.

A. There can be little doubt that the search for Pamela Powers would have continued into Polk County had the body not been discovered through Detective Leaming's activity. Police knew that Williams, with a blanket with legs dangling, fled from the Des Moines YMCA in an auto, eventually surrendering to police in Davenport. *Brewer v. Williams*, 430 U.S. 387, 390 (1977). Since clothing of Pamela Powers was discovered at a rest stop near Grinnell on Interstate 80, the search was originally concentrated in Poweshiek County, where Grinnell is located, and moved in a westerly direction through Jasper County toward Polk County where Des Moines is located. (App. 33-4.) The search was conducted approximately seven miles north and south of Interstate 80. (App. 32.) Over 200 volunteers participated in the activity under instructions to scour all roads, ditches, culverts, or any other places where a small child could be secreted. (App. 32.)

Obviously, the actions of police demonstrated a clear commitment to the theory that the body of Pamela Powers may have been disposed in the vicinity of Interstate 80 somewhere between Des Moines, where Williams was seen with his suspicious bundle, and near Grinnell, where the articles of clothing were discovered. If the body had not been discovered, it is hard to imagine that the police would have called off the search and not pressed their search to its logical geographic conclusion—the YMCA in Des Moines, the origin of Williams' flight. As noted by the state trial court, "the search clearly would have been tak-

en up again where it left off, given the extreme circumstances of the case, and the body would have been found in short order." (App. 86.) *See also Williams v. Nix*, 528 F.Supp. 664, 671 (S.D. Iowa 1981).

In order to undermine the identical findings of the state and federal trial courts, the Respondent attempts to attack the credibility of Detective Ruxlow, who testified emphatically and persuasively in both forums that law enforcement officers intended to continue the search for Pamela Powers' body into Polk County had the body not been discovered. (App. 36, 144-145.) Respondent asserts that "Ruxlow demonstrated a lack of candor at the [state] suppression hearing when he testified that State's Exhibit D (introduced in the District Court as Habeas Exhibit 5, App. 108), a photograph taken at the scene in which the body is plainly visible, showed the body 'exactly as it was found' without any snow removed." (Resp. Br. at 20.)

Respondent's characterization of the Ruxlow testimony is a misrepresentation of the record and should be dismissed summarily here. In fact, Ruxlow testified that Exhibit C, not Exhibit D as claimed by Respondent, showed the body "exactly the way it was found" when he was asked, "Has snow been removed or trampled down [in Exhibit C] as indicated in State's Exhibit D?" (App. 38-39.) Ruxlow's testimony was entirely consistent with that of a previous witness who testified that Exhibit C (Habeas Exhibit 3, App. 107) showed the body as it was discovered, and that in Exhibit D, the photo showed "some movement of snow, tracks, et cetera." (App. 5.) The state trial court, and attorneys for the Respondent, were thus fully and accurately apprised as to what the photos purported to represent, and Ruxlow's testimony, which

demonstrated to the state trial court that he was "an intelligent and organized man with experience in the area of searches," has not been belatedly impeached. (App. 86.)

B. Respondent's contention that the body would not have been discovered even if the search had been continued into Polk County is without merit. Respondent first argues that even if searchers had emerged from their vehicles and looked in the area near the culvert, the body would not have been discovered. (Resp. Br. at 33.) In any case, Respondent maintains that searchers would not have emerged from their vehicles to examine the area near the culvert where the body was found. (Resp. Br. at 34.)

The Respondent's argument that the body would not have been found by searchers who emerged from their vehicles and examined the area around the culvert is unpersuasive. State's Exhibit C (Habeas Corpus Exhibit #3, App. 107) is a photograph which both state and federal courts found depicted the culvert area and the body as it was originally discovered by law enforcement officials.* As can be seen from the photograph which plainly shows the body of the girl against the culvert, anyone who came down into the ditch to look at the culvert would have found the body. See *State v. Williams*, 285 N.W. 2d 248, 262 (1979) (Cert. App. 49), *Williams v. Nix*, 528 F. Supp. 664, 671 (S.D. Iowa 1981).

*Respondent's claim that State's Exhibit C is not a photograph of the site undisturbed by police, Resp. Br. at 33 n. 28, is contrary to the findings of the state and federal courts and not supported by the evidence. (App. 5, App. 35.) Even Respondent's citation to the record, which describes an original photograph as showing a partially nude body partially covered with snow, supports the view that State's Exhibit C is the undisturbed photograph. (App. 124.) This description resembles State's Exhibit C far more than it does Habeas Exhibit #1.

Respondent further contends that because a series of photographs (Habeas Exhibits 7, 8, 9, App. 109-111) apparently taken from the road near the site where the body was found do not clearly show a "culvert or any outbuilding of an abandoned farm," the area would not have been subject to a pedestrian search. (Resp. Br. at 34.)

Respondent ignores, however, the fact that the searchers were explicitly instructed to leave their vehicles and walk through any roadside ditches where visibility was impaired not simply because of culverts or outbuildings but for any reason, including the existence of weeds. (App. 45.) In short, the searchers were to closely examine any places "where a small child could be secreted." (App. 32.) The existence of brush and a clump of trees, plainly visible in the photographs, would have caused searchers to stop their vehicles and emerge from them for a closer look.

In any case, even if searchers only left their vehicles to examine culverts or outbuildings, the Respondent's photographs show that the landscape contained typical physical characteristics that would have alerted searchers to the presence of a culvert. The cluster of trees and brush in Habeas Exhibits 7, 8, and 9 (App. 109-111) demonstrate unusual water flow in the area, a key indication of a culvert. (App. 160.) And, the dip in the landscape on the opposite side of the road, as readily seen in Habeas Exhibit 8, is strongly suggestive of a local water drainage system. The state and federal trial courts cannot be faulted for concluding that searchers would have discovered the culvert and closely examined its immediate surroundings.

C. Even if one accepts Respondent's conclusions, flatly contradicted by the record, that the search would not have continued into Polk County, or, in the alternative, that the body would not have been found immediately had the search continued, it is hard to imagine that the half naked body lying along the culvert would have gone undiscovered for very long, particularly when police had strong suspicions that the body was in the area. *See Johnson, supra*, at 373. The record shows and the state trial court found that forensic evidence relating to the condition of the body would have been preserved until the break of frost in April. (App. at 64, 87.) In any case, even if the precise cause of death might have been obliterated by a belated police discovery of the body, the State clearly would have been able to show (a) the fact of her death, and (b) strong evidence of sexual assault or foul play as revealed by her half naked body. Application of the inevitable discovery exception in this context would not involve the extreme speculation that sometimes infects "hypothetical inevitable discovery cases." *See* Petitioner's Brief at 14.

IV. Respondent's Contention That A Standard Other Than Preponderance Of Evidence Is Required For Invocation Of The Inevitable Discovery Exception Is Inconsistent With Analogous Precedent Of This Court.

A. Respondent's "clear and convincing" standard for application of the inevitable discovery exception to the exclusionary rule, Resp. Br. at 31 n.16, is contrary to this Court's traditional approach to application of similar exceptions. *See Alderman v. United States*, 394 U.S. 165, 183 (1969); *Lego v. Twomey*, 404 U.S. 477, 486-87 (1972).

B. Respondent's effort to extract a "clear and convincing" evidence standard for application of inevitable discovery from *U.S. v. Wade*, 388 U.S. 227 (1967), is without merit. (Resp. Br. at 31, n.16.) In *Wade*, the Court was critically concerned that a defendant's right to meaningfully cross-examine an identifying witness could be substantially impaired by counsel's absence at a pretrial lineup. 388 U.S. at 224. The Court stressed that variance of eyewitness identifications and the great potential of improper influence affecting the fairness and accuracy of subsequent in trial identification. 388 U.S. 228-339. Because pretrial misidentifications can thus fundamentally impair the reliability of the fact finding process, an approach stiffer than the traditional preponderance of evidence standard was applied in this limited setting.

Here, of course, counsel for Respondent had complete ability to cross-examine the State's witnesses testifying about the location and condition of the body. As a result, no threat to the accuracy of the fact finding process is present which requires departure from the preponderance of evidence test. As this Court held in *Lego v. Twomey*, where an issue considered in an admissibility hearing, like in this case, "has nothing to do with improving the reliability of jury verdicts," the preponderance of evidence standard is constitutionally sufficient. 404 U.S. at 486.

V. Contrary To The Position Of The Respondent, The State Met Its Burden In Showing Absence Of Bad Faith.

A. The Respondent wrongly states that this Court found an agreement between Detective Leaming and Respondent's attorney that Leaming would bring Respond-

ent back from Davenport without questioning him. (Resp. Br. at 24.) This Court in *Brewer*, as the Respondent's own citations show, made no such finding. The Court in *Brewer* carefully refrained from concluding that Leaming himself had agreed to anything. The Court found only an agreement between "Des Moines police officials," 430 U.S. at 391 or "appropriate police officials," 430 U.S. at 410 (Powell, J. concurring), or "Iowa law enforcement authorities," 430 U.S. at 415 (Stewart, J. concurring). The record in *Brewer* plainly prevented a more definitive approach with respect to Leaming's understanding or participation in the agreement. See, Kamisar, *Forward: Brewer v. Williams, A Hard Look at a Discomfiting Record*, 66 Geo. L. J. 209, 212-213 (1977). See also Johnson, *The Return of the Christian Burial Speech Case*, 32 Emory L. J. 349, 369-70 (1983).

B. Respondent's claim that this Court's two sentence per curiam opinion in *McLeod v. Ohio*, 381 U.S. 356 (1965), defeats any claim of absence of bad faith on the part of Leaming is misplaced. In *McLeod*, the defendant was *not* represented by counsel, had *not* requested counsel, and apparently had *not* been advised of his right to counsel. See *State v. McCleod*, 203 N.E. 2d 349, 353 (Ohio 1964). Under the specific factual circumstances, a knowing and voluntary waiver of the right to counsel simply could not be demonstrated. As the record in *Brewer* demonstrates, however, the respondent had repeatedly been advised of his right to counsel, had in fact engaged legal counsel, and knew of his right to remain silent. As a result, *McLeod* was not a controlling precedent on the question of whether the *Massiah* doctrine applied where a defendant, fully ad-

vised of his Sixth Amendment right to counsel and demonstrating his ability to exercise his rights, reveals incriminating information to a person the defendant knows to be a police officer. As Justice Blackmun later observed in a post *Brewer* case where a defendant had retained counsel, the "teeter-tottering" in *Massiah* over the importance of a defendant's awareness that a person is a government agent would have been an issue of "some importance" but for *Brewer*. See *United States v. Henry*, 447 U.S. 264, 284 (1980) (Blackmun, J., concurring).

C. Respondent argues that Leaming's distinction between direct questioning of a suspect and conversation is constitutionally irrelevant. (Resp. Br. at 26.) That may have been true in the narrow context of issues presented to this Court in *Brewer*, but the Court is now confronted with the totally different question of whether Leaming believed or could have reasonably believed his conduct was constitutional. The four person minority in *Brewer* and the majority opinion in *Rhode Island v. Innis*, 446 U.S. 232 (1980), conclusively demonstrate that this question must be answered affirmatively.

VI. Contrary To Respondent's Argument, Application Of Stone v. Powell In This Case Cannot Be Defeated On The Ground That Respondent Lacked A Full And Fair Opportunity To Litigate The Admissibility Issue In State Court.

A. Respondent's contention that the state trial court relied on "testimony that was false and seriously misleading," (Resp. Br. at 41) with respect to various photographs

is plainly incorrect and need not be discussed further. *See* Part III, *supra*.

B. The Respondent suggests (Resp. Br. at 41) that the Iowa Supreme Court, in a passing sentence, appeared to believe incorrectly that a photograph showing the left leg of the body in midair represented the scene as it was originally found by police officers. *State v. Williams*, 285 N.W. 2d 248, 262 (1979) (Cert. App. 49). But the Iowa Supreme Court clearly found, in the alternative, that even if the body could not be seen readily from the roadway, as is the thrust of Respondent's argument, the body of Pamela Powers still would have been discovered. As the Iowa Supreme Court noted, and State's Exhibit C (Habeas Exhibit #3, App. 107) clearly demonstrates, "it would have been virtually impossible for anyone who came down into the ditch to look into the culvert, as the searchers were doing, to fail to see the body." *Id.*

The federal district court was not impressed with Respondent's effort to relitigate the issue. Observing that new photographic evidence introduced in the habeas proceeding that was not presented to the state court "neither adds much to nor subtracts much from the suppression hearing evidence," *Williams v. Nix*, 528 F. Supp. at 671 n. 6, (Cert. App. A-79.), the Court found that, while much of the body was covered with snow, "her face and part of her brightly colored striped shirt were not touched by snow and were completely exposed to the view of any person looking at the end of the culvert. The searchers were going into the ditches to look into all culverts, and they would have searched along the road where the culvert and body were located." *Id.* (Cert. App. at 80.) Under

the circumstances, it cannot be claimed that Respondent lacked a full and fair opportunity to litigate the suppression issue in state court.

CONCLUSION

For all the above reasons, and for the reasons expressed in the Petitioner's Brief, the ruling and decision of the United States Court of Appeals for the Eighth Circuit in the above proceeding must be reversed.

Respectfully submitted,

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Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CRISPUS NIX, Warden of the
Iowa State Penitentiary,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

BRIEF OF AMICI CURIAE

State of Illinois, Joined by the States of Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming and Puerto Rico.

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BRIEF OF AMICI CURIAE

State of Illinois, Joined by the States of Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming and Puerto Rico.

INTEREST OF AMICI CURIAE

Pursuant to United States Supreme Court Rule 36.4 the above-listed states, through their Attorneys General, offer their brief in support of the Opening Brief on the Merits filed by the State of Iowa in *Nix v. Williams*, No. 82-1651.

This case presents issues of great importance to the criminal justice system of every state. This matter involves a belated collateral federal attack upon a conviction which resulted from a full and fair state court adjudication. The litigation has been particularly burdensome because it has been virtually constant since the commission of the crime 15 years ago.

Respondent is a state prisoner who petitioned unsuccessfully for a federal writ of habeas corpus. His collateral attack challenges the conviction resulting from his second trial for the crime. This Court affirmed a grant of writ of habeas corpus which invalidated the conviction resulting from Respondent's first trial, *Brewer v. Williams*, 460 U.S. 387 (1977). In both the first and second collateral attacks, Respondent has argued that his sixth and fourteenth amendment right to counsel was violated by the admission of evidence of the murder victim's body at trial. In both instances federal courts have found that the Iowa courts erred in allowing the introduction of the evidence. Thus, this case raises issues central to the administration of criminal justice including the appropriate scope of federal review and supervision of state criminal proceedings; the relevancy of guilt in determining the constitutionality of a conviction; the need for swift punishment and speedy restoration of

criminals to a useful role in society; proper use of limited state resources allocated to the criminal process; and maintenance of public confidence in the judicial system.

These issues affect the ability of every state to maintain law and order and to administer effective criminal justice programs. Thus, Amici possess a strong interest in speaking to the issues presented to the Court by this case.

STATEMENT

The Amici adopt and incorporate by reference the statement of facts set forth in Iowa's Opening Brief on the Merits.

ARGUMENT

THE DOCTRINE OF *STONE v. POWELL* SHOULD BE EXTENDED TO PRECLUDE FEDERAL HABEAS CORPUS REVIEW OF RESPONDENT'S SIXTH AMENDMENT CLAIM WHICH DOES NOT CHALLENGE THE FUNDAMENTAL FAIRNESS OF THE PROCEEDING RESULTING IN HIS CONVICTION.

This case began with the brutal sexual assault and murder of a 10-year-old girl almost 15 years ago. Within 2 years of the murder, Respondent was tried and convicted of the crime and his conviction affirmed by the Iowa Supreme Court. A successful federal collateral attack culminating in review by this Court, resulted in a second trial, conviction, and state supreme court affirmance. Respondent's second collateral federal attack has been litigated in the district and circuit courts and now comes before this Court again. The circuit court held that the introduction of evidence regarding the victim's body at the second trial violated Respondent's sixth and fourteenth amendment right to counsel because the police discovered the location of the body by talking with Respondent outside the presence of his lawyer.

In *Stone v. Powell*, 428 U.S. 465 (1976), this Court held that when a state provides an opportunity for a full and fair litigation of a fourth amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial. This Court reasoned that in the context of federal collateral review of state convictions, the contribution of the exclusionary rule to the effectuation of the fourth amendment is minimal as compared to the substantial societal costs of applying the rule. The rationale of *Stone v. Powell* justifies preclusion of collateral review of this matter.

A.

The State Provided Respondent With An Opportunity For Full And Fair Adjudication Of His Sixth Amendment Claim.

The Iowa courts reviewed Respondent's sixth amendment claim and concluded that the evidence regarding the victim's body was admissible under the standards enunciated by this Court. The decision of the Iowa Supreme Court was appealable to this Court through direct review upon a petition for writ of certiorari. The degree of direct review afforded Respondent sufficiently protected his rights under the sixth amendment.

The alleged constitutional violation occurred at the time of arrest and prior to indictment and the commencement of trial. Respondent does not challenge the constitutional integrity of the truthfinding process which resulted in his conviction in this proceeding. Rather, Respondent contends that his sixth amendment right was violated by police conduct at the time of arrest and immediately thereafter. Respondent maintains that this alleged violation allows him a second bite at the apple, requiring federal collateral review to determine whether highly probative physical evidence discovered through the alleged violation should have been excluded at trial.

In *Rose v. Mitchell*, 443 U.S. 545 (1978), this Court explained the purpose underlying the limitation on collateral review imposed by *Stone v. Powell*. *Rose* involved allegations that the selection of the foreman of the Tennessee grand jury that indicted the defendants violated the fourteenth amendment. The State argued that the doctrine of *Stone v. Powell* precluded collateral review of the issue. This Court rejected that argument stating that in *Stone*, "the Court made it clear that it was confining its ruling to cases involving the judicially created exclusionary

rule, which had minimal utility when applied in a habeas corpus proceeding." 443 U.S. at 560. The Court further reasoned:

... that *Stone* rested to an extent on the Court's feeling that state courts were as capable of adjudicating Fourth Amendment claims as were federal courts. But where the allegation is that the state judiciary itself engaged in discrimination in violation of the Fourteenth Amendment, there is a need to preserve independent federal habeas review of the allegation that federal rights have been transgressed.

Id. at 563.

Thus, if a state court is capable of adjudicating a fourth amendment claim as well as a federal court, it is capable also of adjudicating a fifth or sixth amendment claim as well as a federal court. A fifth or sixth amendment claim merits federal collateral review only when the alleged violation effects the integrity of the proceeding resulting in conviction.¹ Accordingly, an allegation such as gross incompetency of counsel might necessitate collateral review. Under the reasoning of *Stone*, however, such

¹ The Court in *Rose* stated that an allegation of discrimination in the selection of a grand jury foreman, "strikes at the fundamental values of our judicial system" and thus, impairs the integrity of the truthfinding process. *Rose* at 557. In their dissents, however, Justices Stewart and Powell joined by Justice Rehnquist, disagreed with this analysis. The dissenters argued that despite the alleged discrimination in the grand jury selection, the defendant was tried and convicted before an impartial jury and therefore, federal habeas review was unnecessary. Whatever the dispute concerning the effect of alleged discrimination in the grand jury process, there can be no question that the allegedly unconstitutional police conduct in this case did not impair the fairness of the truthfinding process. The alleged violation occurred following the arrest when police questioned the defendant outside the presence of counsel.

review should not be required to assess the constitutional validity of the admission of evidence discovered through statements made outside the presence of counsel at the time of arrest.

This analysis comports with the distinctions drawn by this Court in determining whether a decision should be applied retroactively. See, *Mackey v. United States*, 401 U.S. 667, 688 (1970) (Harlan, J. concurring); *Johnson v. New Jersey*, 384 U.S. 719 (1966). The focus is on the effect of the constitutional violation on the truthfinding process. Thus, while the decision defining the right to counsel in *Gideon v. Wainwright*, 372 U.S. 335 (1963), is given retroactive effect in cases under direct and collateral review, the decision defining the right of the accused to be warned of their rights in *Miranda v. Arizona*, 384 U.S. 478 (1966), is not applicable retroactively. In determining not to give *Miranda* retroactive effect, the Court reasoned that while "*Miranda* guard[s] against the possibility of unreliable statements in every instance of in-custody interrogation, [it] encompass[es] situations in which the danger is not necessarily as great as when the accused is subject to overt and obvious coercion." *Johnson v. New Jersey*, 384 U.S. at 730. Accordingly, the Court concluded that the availability of other safeguards to protect the integrity of the truthfinding process at trial eliminated the necessity for applying *Miranda* retroactively. The Court, therefore, focused on the fundamental fairness of the truthfinding process.

Similarly, in determining whether to extend *Stone v. Powell* to fifth and sixth amendment cases, the logical focus of the analysis is on the effect of the alleged violation on the truthfinding process. The admission of evidence discovered through statements made outside the presence of counsel at the time of arrest does not impair

the fundamental fairness of the truthfinding process. Thus, *Stone v. Powell* should be extended to preclude collateral review in this case where the alleged constitutional violation does not render the truthfinding process fundamentally unfair.

B.

The Societal Costs Outweigh The Constitutional Interests Advanced By A Collateral Federal Review Of An Alleged Constitutional Violation That Does Not Impair The Fundamental Fairness Of The State Judicial Proceeding.

The system of dual review allowed in this case permits a defendant to retry his case in federal court if the outcome in state court does not satisfy him. A defendant may then contest an adverse federal decision through another round of federal review. As Justice Powell noted in *Rose v. Mitchell*:

[not] only may a state claimant have a 'rerun' of his conviction in the federal courts, but also there is no limit to the number of habeas corpus petitions a claimant may file. The jailhouse lawyers in the prisons of this country conduct a flourishing business in repetitive habeas corpus petitions. It is not unusual to see, at this Court, a score or more petitions filed over a period of years by the same claimant.

443 U.S. at 582 (Powell, J. dissenting).

This case comes before this Court a second time after 15 years in the lower trial and appellate courts. Such lengthy and repetitive litigation imposes great costs. Finality in the criminal process is crucial to the concept of justice in an ordered society. As Justice Harlan stated in *Mackey v. United States*:

[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to liti-

gation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.

401 U.S. 667, 690 (1970) (Harlan, J. concurring) *quoting*, *Sanders v. United States*, 373 U.S. 14, 24 (1968) (Harlan, J. dissenting). *See also*, Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi. L. Rev. 142 (1970); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963).

Delay in the criminal process undermines the deterrent effect of criminal law which rests on the premise that criminal behavior will result in swift and sure punishment. Protracted criminal litigation diminishes public confidence in the judicial process and discourages citizens from coming forth to assist law enforcement efforts. Further, repetitive litigation of the same issues in the same case amounts to an unnecessary drain on the limited resources available for criminal prosecution and public defense² and ignores the interests of victims of crimes.

In *Morris v. Slappy*, 51 U.S.L.W. 4399 (April 20, 1983), this Court noted the burdensome effect of endless litigation on crime victims, stating:

in the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage

² Prisoner petitions impose a tremendous burden on the overcrowded federal docket. In 1980, 23,607 prisoner petitions were filed in the United States District Courts. *See, Annual Report of the Director of the Administrative Office of the United States Courts*, 370 (1981).

victims to report violations to the proper authorities . . . The spectacle of repeated trials to establish the truth about a single episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources.

Id. at 4403.

Eliminating collateral review of alleged fifth and sixth amendment violations that do not challenge the integrity of the truthfinding process would reduce the additional burdens placed on crime victims.

Moreover, the circuit court did not further the purpose of the exclusionary rule in holding that the evidence relating to the murder victim's body was constitutionally inadmissible. "[T]he policies behind the exclusionary rule are not absolute." *Stone v. Powell* 428 U.S. at 488. The rule permits the exclusion of unlawfully obtained evidence, which is otherwise reliable and probative, as a deterrence against unconstitutional police conduct. *United States v. Janis*, 428 U.S. 433, 443-47 (1976); *United States v. Calandra*, 414 U.S. 338, 347-48 (1974). "As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Brewer v. Williams*, 460 U.S. 387, 422 (Burger, C.J. dissenting) quoting, *United States v. Calandra*, 414 U.S. at 348.

The sixth amendment ensures the fundamental fairness of a criminal trial and limits the risk of convicting the innocent. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932). Assuming *arguendo* a sixth amendment violation occurred, exclusion of the evidence relating to the murder victim's body would not deter future violations. The allegedly unconstitutional police conduct took place immediately after arrest and

in no way affected the integrity of Respondent's trial. Further, Respondent's guilt was not in question. *See, Brewer v. Williams*, 460 U.S. at 428 (Burger, C.J. dissenting); 437 (White, J. dissenting); 441 (Blackmun, J. dissenting). "The evidence of Williams' guilt was overwhelming." *Williams v. Brewer*, 509 F.2d 227, 237 (8th Cir. 1975) (Webster, J. dissenting). Thus, application of the exclusionary rule in this case produces no deterrent effect and saddles society with the cost of allowing a guilty man to go free.

Broad federal collateral review of state court convictions raises questions concerning the appropriate scope of federal supervisory authority over state judicial systems. *See, Reitz, Federal Habeas Corpus Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315, 1330 (1961). The overextension of federal habeas corpus ignores that the administration of criminal justice is primarily the business of the states. *See, Younger v. Harris*, 401 U.S. 37 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971). In reaffirming the cause and prejudice rule of *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court in *Engle v. Isaac* noted that overly broad federal habeas review necessarily weakens the authority of the states as the primary administrators of criminal justice, stating:

[t]he states possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights.

102 S.Ct. 1558, 1571 (1982).

Further, "to assign a single federal district judge the responsibility of directly reviewing, and inevitably super-

vising the most routine work of the highest courts of a state can only undermine the morale and esteem of the state judiciary . . ." *Jackson v. Virginia*, 443 U.S. 307, 336 (1979) (Stevens, J. concurring). "The review by a single federal district court judge of the considered judgment of a state trial court, an intermediate appellate court, and the highest court of the State, necessarily denigrates those institutions." *Rose v. Mitchell*, 443 U.S. at 585 (Powell, J. dissenting). Thus, the extended use of federal habeas corpus conflicts with traditional principles of federalism.

The Iowa courts reviewed and decided Respondent's constitutional claim. With respect to the excluded evidence, Respondent alleged no constitutional defect in the truthfinding process which resulted in his conviction. Thus, this case did not merit federal collateral review. The burdens of society outweigh any benefit in allowing cases such as this to continue ad infinitum. "If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the questions litigants present or else it never provides an answer at all." *Mackey v. United States*, 401 U.S. at 691 (Harlan, J. concurring).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Eighth Circuit should be reversed.

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TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE,
THE LEGAL FOUNDATION OF AMERICA
AND
AMERICANS FOR EFFECTIVE LAW ENFORCEMENT

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NO. 82-1651

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

CRISPUS NIX, WARDEN, ET AL.,
PETITIONER

V.

ROBERT ANTHONY WILLIAMS,
RESPONDENT

BRIEF OF AMICI CURIAE,
THE LEGAL FOUNDATION OF AMERICA
AND
AMERICANS FOR EFFECTIVE LAW ENFORCEMENT

INTEREST OF AMICI CURIAE

The Legal Foundation of America is a nonprofit corporation supporting the operations of a public interest law firm (as that term is defined in Internal Revenue regulations). Its goals include the preservation of a rational system of criminal justice. In pursuit of this goal, LFA has appeared as amicus curiae in this honorable Supreme Court, in the Court of Appeals, in District Courts, and in the courts of various states. LFA is located upon the campus of the South Texas College of Law in Houston. It shares activities and personnel with the law school. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys.

Americans for Effective Law Enforcement ("AELE"), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operations of the police function to protect our citizens in their life, liberties and property, within the framework of the various state and federal Constitutions. AELE has previously appeared more

than fifty-two times in this Supreme Court and more than thirty times in other courts, including the federal district courts, the federal courts of appeals, and various state courts, such as the supreme courts of California, Illinois, Ohio and Missouri. AELE appeared as amicus curiae in *Brewer v. Williams*, 430 U. S. 387 (1977), in which respondent's previous conviction for the same offense of murder was reviewed.

PRELIMINARY STATEMENT

Amici curiae have not, here, briefed the question whether *Stone v. Powell*, 428 U. S. 465 (1977), is dispositive. We agree with Petitioner's arguments in this regard. If *Stone v. Powell* embraces the present case, there is no need to consider the issues argued in this brief, and conversely, these arguments are offered only to meet the possibility that this Court could decide (as amici contend it should not) that the principles of *Stone v. Powell* are not dispositive.

SUMMARY OF ARGUMENT

This brief is concerned solely with the issue of inevitable discovery (or "hypothetical independent source," as the courts below denominated it). Amici curiae will not attempt to duplicate the comprehensive briefing done by Petitioner on other issues, although we agree with Petitioner's analysis and wish to express support for it.

Amici submit that the Court of Appeals erred in holding that absence of bad faith is a required element of inevitable discovery. This doctrine, like independent source, is a doctrine affecting causation, not the existence of a violation; and the confusion of this doctrine with the separate policy issue of absence of bad faith is both illogical and inconsistent with the governing authority. Furthermore, the Court of Appeals misapprehended the meaning of absence of bad faith. It failed to distinguish adequately the existence of a violation from the separate question of presence or absence of bad faith, and it unfairly tested bad faith by a decision rendered years later rather than by the unsettled nature of the law facing the officer at the time he acted.

ARGUMENT

THE "INEVITABLE DISCOVERY" DOCTRINE IS APPLICABLE UNDER THE FACTS OF THIS CASE.

The Iowa state courts found that the body of Pamela Powers would have been discovered in any event, within a few hours of the actual discovery. This finding is supported by overwhelming evidence¹ and, as a finding of fact, should be conclusive. Under the circumstances, the inevitable discovery doctrine should be regarded as applicable.

- A. *Inevitable discovery is a doctrine affecting causation, not the existence of a violation. Absence of bad faith is not relevant.*

Inevitable discovery and independent source are principles that negate causation. They do not go to the existence of a constitutional violation. Specifically, these doctrines show that the discovery of the particular evidence is not causally related to the alleged violation, because its discovery was inevitable anyway. To put the matter differently, the inevitable discovery and independent source doctrines assume the existence of a violation, but recognize that the violation should not require exclusion of any and all evidence in the case, and in particular that it should not exclude evidence not found by reason of the violation—i.e., in the absence of causation.

As the Iowa Supreme Court pointed out, the inevitable discovery doctrine is a special case of the independent source doctrine.² In applying the independent source doctrine earlier this year, this honorable Supreme Court stated, "The issue is . . .

1 See note 9 *infra*.

2 285 N. W. 2d at 256. As the Iowa court pointed out, "inevitable" discovery overstates the requirement, and "hypothetical independent source" is actually a more descriptive name. *Id.*

whether the causal connection" requires suppression of the evidence. *Pillsbury Co. v. Conboy*, 51 U. S. L. W. 4063 (U. S. S. Ct. Jan. 11, 1983).

It is therefore illogical, bad policy, and inconsistent with the decisions of this Court to make the applicability of independent source or inevitable discovery depend upon the presence or absence of bad faith in the initial violation. The "fruit of the poisonous tree" cases, tracing back to *Wong Sun v. United States*,³ do not depend upon presence or absence of bad faith. The evidence is admissible if an independent source is shown, but otherwise it is excluded. Similarly, the "use immunity" cases, such as *Conboy*, *supra*, or *Kastigar v. United States*,⁴ require that the State demonstrate that it would have had the evidence in any event. Absence of bad faith is irrelevant.⁵ Similarly, when a suspect invokes his right to counsel during interrogation, and then—at a later time—engages in a valid waiver and confesses, this honorable Supreme Court has treated the issue as one of causation.⁶ Good or bad faith in the initial violation is irrelevant, because the question is whether the State would have had the evidence anyway.

3 371 U. S. at 471, 486 (1963) (poisonous tree doctrine inapplicable if "intervening" cause "sufficiently . . . purges the primary taint of the unlawful violation"). See also *Harrison v. United States*, 392 U. S. 219, 222-24 (1968) (applying *Wong Sun* to statements following illegally obtained confession); *Rawlings v. Kentucky*, 448 U. S. 98, 107-110 (1980); *Brown v. Illinois*, 442 U. S. 590, 600-04 (1975).

4 406 U. S. 441 (1972).

5 *Kastigar* states that the fact an officer acts "unintentionally" is irrelevant. 446 U. S. at 452. Cf. *United States v. Agurs*, 427 U. S. 97, 110 (1976) (it is the fact that the violation does or does not "result in" the offending event that controls, not the "moral culpability or willfulness" of the official).

6 E.g., *Oregon v. Bradshaw*, 51 U. S. L. W. 4940 (U. S. S. Ct. June 23, 1983). *Bradshaw* and related cases are discussed in part B of this brief *infra*.

This Court has been careful to limit the exclusionary rule to situations in which the deterrent function is not diminished by attenuation. In refusing to apply the rule in a wide variety of cases in which the "taint" has been attenuated, this Court has never made the absence of bad faith in the initial violation determinative.⁷ Thus in *Harris v. New York*,⁸ this Court allowed statements not conforming to the requirements of *Miranda v. Arizona* to be used for impeachment, on the ground that exclusion would go beyond the purpose of deterrence; the presence or absence of bad faith in the initial *Miranda* violation was not considered.

In the present case, there has been exclusion of the most relevant evidence, the fact that defendant led officers to the body of Pamela Powers. Excluding evidence that the State would have found in any event, without causation from the alleged violation, would go far beyond the appropriate confines of the deterrence function. In fact, it would deter good police work: The inevitable discovery doctrine, here, was based upon scientific and diligent, indeed exceptionally methodical, efforts

7 Thus this Court has withheld suppression when illegality has been attenuated by intervening events, the defendant has lacked standing, the challenge has arisen in habeas corpus, use of the evidence was before the grand jury, use was for impeachment, or the resulting arrest was used to increase sentence in another, unrelated case. *United States v. Ceccolini*, 435 U. S. 368 (1978); *Stone v. Powell*, 428 U. S. 465 (1976); *United States v. Peltier*, 422 U. S. 531 (1975); *Michigan v. Tucker*, 417 U. S. 433 (1974); *United States v. Calandra*, 414 U. S. 338 (1974); *United States v. Tucker*, 404 U. S. 433 (1972); *Harris v. New York*, 401 U. S. 222 (1971).

In none of these cases was the presence or absence of bad faith determinative. In fact, the existence of bad faith was not even considered.

8 401 U. S. 222 (1971). The Court simply stated that even if it could be "assumed" that the officers acted consciously so that they could be deterred, "sufficient deterrence" resulted from exclusion on direct.

by searching officers to find Pamela Powers' body,⁹ and such efforts should not be discouraged.

The absence of bad faith is a wholly separate reason for not applying the exclusionary rule, apart from inevitable discovery. Indeed, this honorable Court has before it, now, three cases dealing with the question whether absence of bad faith should itself be the basis of an exception to the exclusionary rule. *Massachusetts v. Sheppard*, *Colorado v. Quintero*, *United States v. Leon*, cert. granted, 51 U. S. L. W. 3913-14 (U. S. S. Ct. June 30, 1983). If a good-faith exception is created, and if absence of bad faith is required for inevitable discovery, there will be no need for the inevitable discovery doctrine at all, because in every case in which inevitable discovery is applicable, the good faith exception will apply. But irrespective of the result in those cases, the good-faith exception and the inevitable discovery doctrine serve different policy bases and should not be confused.

The imposition of the absence-of-bad-faith requirement below appears to be traceable to the invention of Professor Wayne LaFave, who proposed the requirement in a book.¹⁰ From there, the Iowa Supreme Court adopted it (but found an absence of bad faith);¹¹ the Court of Appeals took the requirement from the

9 The manner in which the officers inferred the location of the proper search area, and did so correctly, is described in the Iowa Supreme Court's opinion, 285 N. W. 2d 260-62. This was clever and diligent detective work. The plotting of the area into grids, organization of personnel, systematic assignment of search responsibilities, and directions to look into ditches and culverts (precisely where the body was found), are also described. *Id.* This was not just good police work, it was excellent police work, and it should not be discouraged or punished by exclusion.

10 W. LaFave, *Search and Seizure* sec. 11.4 (1978).

11 285 N. W. 2d at 258. The Iowa court cited no authority other than Wayne LaFave for this requirement. This authority should have been less persuasive than the decisions of the many courts that have considered the issue, cited by the Iowa court at 256-60.

Iowa court. The requirement is neither logical nor required by the opinions of this Supreme Court, and in fact it appears to be inconsistent with those opinions for the reasons given above.

B. The Court of Appeals' evaluation of the "absence of bad faith" issue was erroneous.

The Court of Appeals considered irrelevant the fact that this honorable Supreme Court divided by the closest possible margin—as have other courts—in deciding whether custodial interrogation even existed in the first place. The Court of Appeals used the opinion in *Brewer v. Williams*,¹² in fact, to determine that bad faith was not absent.¹³

In this, the Court of Appeals missed the point. The prior decision in *Brewer v. Williams* held only that a constitutional violation had occurred, and it did not decide whether Officer Learning acted in bad faith.¹⁴ The Court expressly reserved the issue of inevitable discovery. Furthermore, the Court of Appeals determined the issue as though the officer should have known what this honorable Supreme Court would decide years later. Instead, the presence or absence of bad faith is to be determined from information available to the officer *as a lay person, at the time he acted*.

Although there are no decisions of this Court defining absence of bad faith in this precise context, there are many cases dealing with the issue as a defense to civil rights damage claims under 42 U. S. C. sec. 1983. The seminal case is *Mr. Chief Jus-*

¹² 430 U. S. 387 (1977).

¹³ 51 U. S. L. W. at 2451.

¹⁴ The Court of Appeal's observations that "an opinion of the Supreme Court is no less declaratory of the law of the land when a majority joins it" and "the majority rules" are correct, but they indicate how badly the Court of Appeals missed this point. The opinion "declares the law" only as to those points the majority has considered.

tice Warren's opinion in *Pierson v. Ray*, 386 U. S. 547 (1967). There, officers had arrested civil rights demonstrators under a trespass statute that this Supreme Court held unconstitutional. Further, it was clear that the identity of the arrestees as civil rights demonstrators was influential in prompting the arrests, and the principles of law making the statute unconstitutional were clearly established.¹⁵ Nevertheless, Mr. Chief Justice Warren's opinion for the Court recognized the officers' defense of good faith, and said: ¹⁶

A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest, and being mulcted in damages if he does not.

Another court rejected a rule of law that would punish officers¹⁷

... every time they miscalculated in regard to what a court of last resort might determine constituted an invasion of constitutional rights, even where, as here, a trial judge—more learned in law than a police officer—held that no such violation occurred.

Mr. Chief Justice Warren pointed out that the trial judge, in *Pierson v. Ray*, had considered the officers' actions proper.¹⁸ The

15 The section 1983 defense is usually stated as "good" faith, not the "absence of bad" faith. Hence the sec. 1983 cases actually set forth a more stringent standard. The "absence of bad faith" should be easier to meet than the sec. 1983 standard.

16 386 U. S. at 555.

17 *Foster v. Zeeko*, 540 F. 2d 1510, 1314 (7th Cir. 1976); accord, *Bowens v. Knazze*, 237 F. Supp. 826, 829 (1965).

18 The trial judge had convicted the arrestees. The opinion in *Pierson* extended immunity to the judge, also, in absolute form, because of the need to preserve judicial independence.

Court of Appeals here held that not only the trial judge's opinion, but that of appellate judges on the Iowa Supreme Court and the Eighth Circuit,¹⁹ did not matter, contrary to Mr. Chief Justice Warren's view. Policemen, as he stated in *Pierson*, "are not charged with predicting the future course of constitutional law,"²⁰ and the view that others have taken, especially judges reviewing the case, is especially relevant in determining presence or absence of bad faith.

In fact, bad faith is present only if the officer has acted against clearcut, settled law. Thus in *Wood v. Strickland*,²¹ the majority said that bad faith could be shown by actions in "disregard of settled, indisputable law" or "basic unquestioned constitutional rights." The majority concluded by saying that bad faith could be shown²²

... only if the [official] has acted with such an impermissible motivation or with such disregard of [another's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

19 The parallels between *Pierson v. Ray* and the present case are striking. There, as here, there had been an intervening decision of the Supreme Court adjudicating the conduct of the officers unlawful under the Constitution. *Thomas v. Mississippi*, 380 U. S. 524 (1965). The difference is that, in *Pierson*, Mr. Chief Justice Warren did not use the holding of unconstitutionality to resolve the separate question of bad faith. There, as here, at least one judge came to a contrary decision on the question of unconstitutionality.

20 386 U. S. at 557.

21 420 U. S. 308 (1974).

22 420 U. S. at 321-22. See also *Procunier v. Navarette*, 434 U. S. 555, 562 (1977).

The Court of Appeals erroneously assumed that absence of bad faith could be made out only by proof of Officer Learning's subjective state of mind; thus it noted that "there is not even a self-serving

Justice Powell, in a separate opinion joined by the Chief Justice, Mr. Justice Blackmun, and Mr. Justice Rehnquist, considered even this standard excessively harsh, and pointedly argued that when this honorable Supreme Court divides in a "five-to-four decision," a finding of bad faith would rest upon "an unwarranted assumption as to what lay . . . officials can know about the law and constitutional rights." 23

Even today, the unsettled nature of the law governing custodial interrogation, when the accused has previously claimed his right to counsel, makes it a difficult area of the law and a continuing source of opinions of this Court. E.g., *Edwards v. Arizona*, 451 U. S. 477 (1981) (evidence excluded); *Oregon v. Bradshaw*, 51 U. S. L. W. 4940 (U. S. S. Ct. June 23, 1983) (evidence properly admitted). In *Bradshaw*, the Court divided by five to four in holding that a previous claim of right to counsel was validly waived by a question from the accused not directly related to his guilt or innocence. Cf. *Solem v. Stumes*, cert. granted, 51 U. S. L. W. 3929 (U. S. S. Ct. July 6, 1983) (concerning whether *Edwards v. Arizona* should be applied retroactively

statement from Learning himself." 51 U. S. L. W. at 2452. This was wrong, because bad faith depends upon "objective" as well as "subjective" elements. *Wood v. Strickland*, supra, 420 U. S. at 321. "[T]he appropriate standard necessarily contains elements of both." *Id.* The Court in *Wood* repeatedly emphasizes determining whether the conduct in question is "reasonable." This is a separate question from subjective belief and is not dependent on "self-serving" statements from the actor himself. E.g., *Id.* at 319, 321. And even more significantly, in *Procunier v. Navarette*, the Court upheld a summary judgment, not based on any testimony about subjective belief, but based upon the absence of "settled" decisions on the precise points of law—an element that is clearly present here.

- 23 Mr. Justice Powell referred to the five-to-four decision in *Goss v. Lopez*, 419 U. S. 565, (1975), pointing out that informed lawyers and judges would have thought before *Goss* that the contrary to its holding was "settled, indisputable, and unquestioned." 420 U. S. at 329. "[O]ur five-to-four splits," said Mr. Justice Powell, demonstrate "the hazard of even informed prophecy as to what are 'unquestioned constitutional rights.'" *Id.*

to incriminating statements resulting from questioning during 10-hour car ride after suspect had invoked right to counsel).

The Court of Appeals held that "a design to obtain incriminating evidence by mental coercion is a design to violate the Constitution." 51 U. S. L. W. at 2452. This statement is indicative of the Court of Appeals' confusion of the issue of violation with the issue of bad faith. In fact, this Court has expressly rejected the Court of Appeals' reasoning. In *Procunier v. Navarette*,²⁴ prison officials were alleged to have "interfered with" and "confiscated" the plaintiff inmates' mail. This Court upheld a summary judgment for the prison officials, holding that the unsettled nature of the law²⁵ regarding the constitutionality of prisoner mail restrictions made the officials' conduct in good faith as a matter of law. The inmates argued that first amendment principles (if not the decisions) were clear, and that the officials had acted with intention to cause the interference in a manner tantamount to intention to violate the Constitution. This honorable Supreme

24 434 U. S. 555 (1978).

25 In ruling that Officer Leaming's state of mind was, legally, a "design to violate the Constitution, the Court of Appeals erroneously assumed that lack of bad faith in an error of law could not suffice. In fact, lack of bad faith in an error of law has been treated the same as lack of bad faith in an error of fact. *Butz v. Economou*, 438 U. S. 478, 507 (1978); *Pierson v. Ray*, 386 U. S. 547, 555 (1967).

For example, in *Benson v. Hightower*, 633 F. 2d 869 (9th Cir. 1980), the defendants were U. S. Customs officers who arrested Benson for smuggling gold. The trial judge later held that the Krugerrands Benson was importing were currency and therefore not declarable under the law. Benson claimed the defendants were in bad faith because their arrest was based on a mistake of law; the intent to arrest him was thus, he argued, an intent to arrest in violation of law. (This argument precisely parallels the conclusion of the Court of Appeals.) In *Benson v. Hightower*, the Ninth Circuit said:

Supreme Court dicta, analogous cases, and other authority support the rule that a good faith mistake of law should be treated no differently than a mistake of fact. [Citing *Butz v. Economou*, *Pierson v. Ray*.]

633 F. 2d at 871.

Court held that such reasoning was permissible only if the officials "intend[ed] the consequences of [their] conduct," i.e., intended to violate the Constitution specifically; but bad faith could not be made out merely by proof of design to commit an act as to which unconstitutionality was not definitively settled.²⁶

CONCLUSION

Amici curiae submit that the rule of *Stone v. Powell*, 428 U. S. 465 (1977), should be dispositive here. In the event it is not, however, this honorable Court should reverse the decision of the Court of Appeals and should hold the inevitable discovery doctrine applicable. The Court of Appeals erred, first, in holding that the inevitable discovery doctrine required a showing of the absence of bad faith. Bad faith as a policy factor affecting exclusion is fundamentally different from independent source or inevitable discovery, which affect causation. These different doctrines should not be confused. The opinions of this honorable Supreme Court have avoided confusing them. The Court of Appeals erred, secondly, in finding bad faith as a matter of law under these circumstances. The Court confused the violation itself with the separate question of bad faith, and it used law declared years later to determine the issue. The decisions of this Court indicate that bad faith is to be found only in the presence of actual malice or disregard of clearly settled constitutional law that a lay officer should have had no doubt of at the time and under the circumstances in which he acted. In the event the absence of bad faith cannot be determined as a matter of law, if it is necessary to reach the question, the case should be remanded for a hearing on that issue, not for a third wholly new trial.

26 434 U. S. at 566.

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No. 82-1651

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

CRISPUS NIX, WARDEN OF THE
IOWA STATE PENITENTIARY,

Petitioner,

—v.—

ROBERT ANTHONY WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF OF THE NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION, *AMICUS CURIAE***

IN SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

Whether Stone v. Powell, 428 U.S. 465 (1977), should be extended to preclude federal habeas corpus review over claims that certain physical evidence was obtained and erroneously admitted at trial in state court in violation of the Sixth Amendment right to counsel.

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No. 82-1651

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

CRISPUS NIX, WARDEN OF THE
IOWA STATE PENITENTIARY, PETITIONER

v.

ROBERT ANTHONY WILLIAMS, RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

INTEREST OF AMICUS

The National Legal Aid and Defender
Association (NLADA) is a not-for-profit
organization whose members include the
great majority of public defender of-
fices, co-ordinated assigned counsel

systems and legal services agencies in the nation. The organization also includes two thousand individual members, most of whom are private practitioners.

NLADA's primary purpose is to assist in providing effective legal services to persons unable to retain counsel. In carrying out this purpose, NLADA has a strong interest in protecting its members' clients' constitutional rights, particularly from violation by police, and in assuring full access to the courts for trial, appellate and habeas litigation concerning those rights. Consistent with this interest, NLADA believes that persons convicted in state courts should have available broad review and remedies in federal courts.

SUMMARY OF ARGUMENT

The doctrine of Stone v. Powell, 428 U.S. 465 (1977), should not be extended to foreclose federal habeas corpus review of claimed Sixth Amendment violations. The right to counsel ensures the fairness of trial and thus preserves the integrity of our adversary system of criminal justice. In the Sixth Amendment context, the exclusionary rule is not applied primarily to deter police behavior; rather, its purpose is to ensure that evidence gathered in contravention of the adversary process does not taint and unbalance the trial itself.

The reliability of evidence obtained in violation of the right to counsel has

been, and should continue to be, irrelevant to the question of its admissibility. The introduction of such evidence at trial, whether or not reliable, seriously undermines defense counsel's role, and infects the trial itself.

ARGUMENT

- I. THE "INEVITABLE DISCOVERY" DOCTRINE PROPOSED BY THE PETITIONER IS INCONSISTENT WITH THE SIXTH AMENDMENT RIGHT TO COUNSEL.

The National Legal Aid and Defender Association, as amicus curiae, fully supports the argument of the respondent in this action that adoption of the "inevitable discovery" doctrine -- more aptly referred to by the respondent as the "hypothetical probable discovery" doctrine -- would be inconsistent with the fundamental purposes of the Sixth Amendment right to counsel. However, because the interests of the NLADA in this case relate primarily to the question of whether the holding of Stone v. Powell,

428 U.S. 465 (1977), should be extended from Fourth Amendment cases to Sixth Amendment cases, this amicus brief will focus on that question.

II. INSURING THE INTEGRITY OF THE ADVERSARY PROCESS REQUIRES THAT STONE V. POWELL NOT BE EXTENDED TO PREVENT THE EXCLUSION OF PHYSICAL EVIDENCE OBTAINED IN VIOLATION OF THE RIGHT TO COUNSEL.

The petitioner argues that this Court should extend the holding of Stone v. Powell, 428 U.S. 465 (1977), to preclude federal habeas review when a claim is made that a state court has erroneously admitted "reliable" evidence in violation of the defendant's Sixth Amendment right to counsel if the state court has provided a full and fair opportunity to

litigate the claim. This argument fails to appreciate the difference between Fourth and Sixth Amendment claims, unduly emphasizes the reliability of evidence in defining the availability of federal habeas review, and advances a rule that will confuse the scope of federal habeas review.

This Court in Stone v. Powell carefully limited the reach of its opinion to review of the judicially created exclusionary rule in the Fourth Amendment setting, "stress[ing] that its decision to limit review was 'not concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally.'" Rose v. Mitchell, 443 U.S. 545, 560 (1979), quoting Stone v. Powell, 428 U.S. at 495 n. 37. Cf. Cardwell v. Taylor, ____ U.S. ____, 103 S.Ct. 2015 (1983).

Enforcement of Fourth Amendment claims by an exclusionary rule attempts to regulate police conduct occurring outside the framework of the adversary system. Recognizing this and rejecting the notion that illegally seized evidence "taints the judicial process," Stone v. Powell held that in the context of Fourth Amendment claims federal habeas review was unnecessary to secure compliance with that Amendment.

The right to counsel, on the other hand, is an integral part of the adversary process. It is guaranteed at and after the initiation of adversary judicial proceedings. Kirby v. Illinois, 406 U.S. 682 (1972). Police conduct that infringes on the function of counsel undermines and

dilutes the role of counsel in the adversary system.

[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial ... the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

Powell v. Alabama, 287 U.S. 45, 57 (1932).

Interference with the function of defense counsel thus seriously denigrates the accused's right to a fair trial. And guaranteeing the fairness of the trial is the essence of federal habeas jurisdiction.

See ~~Ross~~ Ross v. Mitchell, 443 U.S. at 582 (Powell, J., concurring) (habeas corpus review should be limited to "a challenge to the fairness of the trial itself.")

The fairness of the trial has its roots in the adversary process. See generally Gideon v. Wainwright, 372 U.S. 335 (1963). It is for this reason that a defendant in a criminal case has a constitutional right to counsel after

the government has committed itself to prosecute, ... [when] the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.

Kirby v. Illinois, 406 U.S. at 689. It was not, therefore, only out of concern for the fairness of the pretrial police interrogation itself that in Massiah v. United States, 377 U.S. 201 (1964), the Court found the right to counsel to

apply. Rather, Massiah ensured that the trial which followed would be fair and not simply a replay of the extra-judicial interrogation of the defendant.

Unlike police conduct that flouts the Fourth Amendment, police conduct that interferes with counsel permits the prosecution to obtain evidence for use at trial by circumventing the basic rules of the adversary process. In Massiah, the Court held that the defendant's right to counsel had been violated not when the police acted improperly but "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206 (emphasis added).

Moreover, the deterrence premise underlying the Fourth Amendment exclusionary rule as it relates to police conduct was utterly absent in the Massiah analysis of the Sixth Amendment violation. Indeed, the Court expressly stated that it may be appropriate in many cases for law enforcement to continue an investigation into the criminal activity of an accused and his associates. Nonetheless, it concluded, the statements obtained from the individual whose right to counsel had been violated "could not constitutionally be used by the prosecution as evidence against him at his trial." 377 U.S. at 207. (emphasis original).

The Massiah rule of exclusion for Sixth Amendment right-to-counsel violations was thus not intended to deter pre-

trial conduct by the police, but rather was meant to safeguard the fairness of the trial. The rationale behind Stone v. Powell - that collateral federal review of unlawful police conduct would not significantly aid in deterring such conduct - does not justify withdrawing federal habeas review of claims based on the Sixth Amendment rule of exclusion. The benefit to be gained by the continued applicability on habeas corpus of the exclusionary rule to Sixth Amendment claims is the protection of the integrity of the adversary process.

[A] Constitution which guarantees a defendant the aid of counsel at ... trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less ... might deny a defendant "effec-

tive representation by counsel
at the only stage when legal
aid and advice would help him."

Massiah v. United States, 377 U.S. at 204,
quoting Spano v. New York, 360 U.S. 315,
326 (Douglas, J., concurring).

Moreover, federal habeas relief should
not be foreclosed merely because the evi-
dence at issue is "reliable" and probative;
nor has this Court accepted the defendant's
guilt as determinative of the issue. Rose
v. Mitchell, supra, in fact, rejected this
approach, and emphasized that federal ha-
beas review must remain available to con-
sider an issue unrelated to guilt where
the integrity of the state judicial pro-
ceedings is questioned. Id., 443 U.S. at
559-564. This rule has particular appli-
cability to right-to-counsel claims.

When the government has made an "end run" around counsel, or effected pretrial discovery in disregard of the norms of legitimate adversary procedure, it is wholly beside the point to claim that the evidence obtained by such tactics was reliable. Use of the evidence taints the judicial proceedings in a fundamental way, and relief on habeas must remain open.

Schulhoffer, Confessions and the Court,
79 Mich. L. Rev. 865, 889-890 (1981).

Thus, where privileged communications between the defendant and counsel are intercepted by the government, the use of such undoubtedly "reliable" and probative information at trial violates the Sixth Amendment and is prohibited. See Weatherford v. Bursey, 429 U.S. 545 (1977). It is only by prohibiting the use of such evidence at trial, regardless of its reliability, that the right to counsel can

be protected. Federal habeas relief, even if the improperly procured evidence is reliable, must remain available to assure compliance with the Sixth Amendment and to preserve the integrity of the adversary criminal process.

For the same reasons, it is not enough to grant federal habeas review of Sixth Amendment claims involving confessions -- whose reliability is suspect -- while barring review of cases involving physical evidence. Such a rule would effectively hollow out the guarantees of the Sixth Amendment by encouraging illegal interrogation of defendants for the purpose of recovering not confessions, but derivative physical evidence.

The necessity of federal habeas review of Sixth Amendment claims is underscored by Estelle v. Smith, 451 U.S. 454 (1981). In Estelle, this Court excluded psychiatric opinion evidence derived from statements made by the defendant to the psychiatrist during an interview that occurred without notice to defense counsel. The rule urged by the State in the case at bar - that claims involving "reliable" and "probative" evidence obtained in violation of the Sixth Amendment should not be cognizable on federal habeas review - would arguably have applied in Estelle. Whether review was available or not would have turned on the reliability of the derivative evidence. This determination would have had to take into account the

myriad factors involved in predicting the future dangerousness of the individual. Estelle demonstrates that the reliability of the evidence is an unsatisfactory benchmark for federal habeas jurisdiction.

The judicial created exclusionary rule, which deters violations of the Fourth Amendment, is not a personal constitutional right. Stone v. Powell, 428 U.S. at 486. But the right to effective assistance of counsel, which is not so much enforced as defined by exclusion of evidence unfairly obtained, is a personal constitutional right that protects the adversary system of criminal prosecution. Gideon v. Wainwright, supra. As such, Sixth Amendment claims must remain cognizable in federal habeas corpus proceedings.

CONCLUSION

For the reasons stated herein, this Court should affirm the judgment of the Eighth Circuit Court of Appeals.

Respectfully Submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1983

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

The United States will address the following question:

Whether, at respondent's retrial on a charge of first-degree murder, evidence pertaining to the discovery and condition of the victim's body was properly admitted under the inevitable discovery exception to the exclusionary rule.

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BRIEF FOR THE UNITED STATES AS
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INTEREST OF THE UNITED STATES

This case presents an important issue relating to the scope of the exclusionary rule that has not previously been settled by this Court. Every federal court of appeals, however, has explicitly endorsed the "inevitable discovery" exception to the exclusionary rule (see pages 10-11, *infra*). Accordingly, the Court's decision in this case is as likely to affect federal prosecutions as state prosecutions. Because the proper application of the exclusionary rule is central to the fair and efficient administration of criminal justice, the United States has a substantial interest in the outcome of this case.

STATEMENT

In *Brewer v. Williams*, 430 U.S. 387 (1977), this Court affirmed the grant of federal habeas corpus relief setting aside respondent's state conviction for first-degree murder after concluding that statements leading the police to the victim's body had been obtained from respond-

ent in violation of his right to assistance of counsel. In an oft-cited footnote, however, the Court observed that, on retrial, evidence of where the body was found and its condition "might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from [respondent]" (430 U.S. at 407 n.12).

1. On retrial, evidence of the body and its condition was admitted on the theory suggested by this Court, and respondent was again convicted of first-degree murder. The Iowa trial court held a suppression hearing at which it determined that the State had proven, by a preponderance of the evidence, that the body would have been discovered in any event. The Supreme Court of Iowa affirmed the conviction (Pet. App. A28-A67). In a comprehensive opinion, that court held that it would adopt the "inevitable discovery" doctrine as an exception to the exclusionary rule. The court concluded that the doctrine should consist of a two-part test (Pet. App. A40-A41):

First, use of the doctrine should be permitted only when the police have not acted in bad faith to accelerate the discovery of the evidence in question. Second, the State must prove that the evidence would have been found without the unlawful activity and how that discovery would have occurred. Courts must use extreme caution to avoid applying the rule on the basis of hunch or speculation.

The Iowa trial court had not included the absence of police bad faith as an element in its invocation of the inevitable discovery doctrine. Nevertheless, the state supreme court was able to find for itself that the State had satisfied that prong of the test because, in its view, the relevant inquiry was objective in nature. The court explained its ruling for the State on the bad faith issue as follows (Pet. App. A45):

While there can be no doubt that the method upon which the police embarked in order to gain Williams's assistance was both subtly coercive and purposeful,

and that its purpose was to discover the victim's body, * * * we cannot find that it was in bad faith. The issue of the propriety of the police conduct in this case, as noted earlier in this opinion, has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.

The state supreme court then turned to the factual question: whether the State had shown by a preponderance of the evidence that the victim's body would have been found by lawful means.¹ The court reviewed in considerable detail (Pet. App. A46-A49) the evidence relating to the ongoing search for the body and how that search would have progressed in the absence of respondent's statements leading the police to the body. It summarized its finding as follows (*id.* at A49) :

Our review of the evidence leads to the conclusion that persons conducting a search such as the one which was conducted in Poweshiek and Jasper Counties and which was to be continued into Polk County would have found the body of Pamela Powers. Her body was frozen to the side of a cement culvert. It would have been nearly impossible for anyone who came down into the ditch to look into the culvert, as the searchers were doing, to fail to see the child's body. We thus conclude that as a result of the search that was underway, and which would have been continued, the body of Pamela Powers would have been found even in the absence of assistance by defendant. Further, that body would have been found in essentially the same condition it was in at

¹ Iowa law provides for de novo appellate review of factual as well as legal determinations in cases raising constitutional challenges. See *Armento v. Baughman*, 290 N.W.2d 11, 15 (Iowa 1980); *State v. Ege*, 274 N.W.2d 350, 352 (Iowa 1979); *Watts v. State*, 257 N.W.2d 70, 71 (Iowa 1977).

the time of the actual discovery, so that all of the evidence which it actually yielded would have been available to the police.

After rejecting other issues raised by respondent, the state supreme court affirmed the conviction, and this Court denied respondent's petition for a writ of certiorari (446 U.S. 921 (1980)).

2. Thereafter, respondent sought habeas corpus relief under 28 U.S.C. 2254 in the United States District Court for the Southern District of Iowa. Respondent advanced three specific challenges to the state courts' rulings on the inevitable discovery doctrine: (1) that the inevitable discovery doctrine is constitutionally deficient; (2) that the burden of proof applied by the state courts was constitutionally inadequate; and (3) that the finding that the body would have been discovered in any event was not supported by the record (Pet. App. A75).

The district court rejected all of respondent's challenges. Although it never specifically addressed the presence or absence of police bad faith in this case, the court approved the state supreme court's two-part formulation of the inevitable discovery doctrine (Pet. App. A77). The district court also agreed with the application of a preponderance of the evidence burden of proof, rejecting respondent's claim that the State should have been required to prove inevitable discovery by clear and convincing evidence (*id.* at A77-A78). Finally, the court held that it was required to presume the correctness of the state courts' factual findings unless one of the exceptions to 28 U.S.C. 2254(d) was applicable (Pet. App. A78). Respondent contended that he had newly discovered evidence showing that material facts were not adequately developed at the state court suppression hearing and that that hearing was not full, fair and adequate (see 28 U.S.C. 2254(d) (2) and (6)). The district court doubted that respondent had exhausted his state remedies with respect to the newly discovered evidence and also doubted that the new evidence was of sufficient import to bring respondent within one of Section 2254(d)'s ex-

ceptions (Pet. App. A79-A80), but it nevertheless conducted its own independent review of the evidence. Based on that review, the district court concluded, as had the state courts, that the body would have been found by the searchers in essentially the same condition it was in at the time of the actual discovery (*id.* at A80). The court explained (*ibid.*):

The body was right next to the end of a culvert located beneath a road. Much of the body was covered with snow, but her face and part of her brightly colored striped shirt were not touched by snow and were completely exposed to the view of any person looking at the end of the culvert. The searchers were going into the ditches to look into all culverts, and they would have searched along the road where the culvert and body were located.

After rejecting respondent's other collateral attacks on the conviction, the district court denied his petition for a writ of habeas corpus (Pet. App. A88).

3. The court of appeals reversed (Pet. App. A1-A18). For purposes of its decision, the court assumed without deciding that there is an inevitable discovery exception to the exclusionary rule and that the state supreme court had correctly articulated its requirements (*id.* at A9). The court then held that the State had failed to show that the police did not act in bad faith (*id.* at A9-A17).²

The court first held that the state supreme court's finding that the police did not act in bad faith was not entitled to the presumption of correctness mandated by 28 U.S.C. 2254(d). It observed (Pet. App. A11) that the "Iowa court's discussion of bad faith is not really a finding of fact at all. It is more like a legal conclusion that police conduct later found constitutionally blameless

² Because its decision rested on the State's alleged failure to prove the absence of bad faith, the court of appeals did not review the factual evidence relating to inevitable discovery, nor did it determine whether the burden of proof should be clear and convincing evidence or a preponderance of the evidence (Pet. App. A9-A10).

by a large minority of this Court and the Supreme Court cannot amount to bad faith." Alternatively, the court held that, if the state supreme court's opinion was to be treated as a finding of fact that Detective Leaming honestly believed his conversation with respondent (see *Brewer v. Williams*, 430 U.S. at 392-393) did not violate the Sixth Amendment, then it was "utterly without record support" and thus exempt from Section 2254(d)'s presumption of correctness (see 28 U.S.C. 2254(d)(8)).

The court of appeals went on to reject the notion that bad faith was to be measured objectively. It held (Pet. App. A12) that the "question before us is not whether the Supreme Court's opinion in *Brewer v. Williams* is fairly debatable as a legal matter. Obviously it is. The question is rather what was in Detective Leaming's mind during that car ride back to Des Moines. * * * The relevant question—bad faith—is subjective."

In concluding that the record failed to support the absence of police bad faith, the court noted (Pet. App. A13-A14) that in *Brewer* this Court referred to the Sixth Amendment violation as "clear"; described the police conduct as having been undertaken "deliberately," "designedly," and "purposely"; and found the situation before it to be "constitutionally indistinguishable from" the situation in *Massiah v. United States*, 377 U.S. 201 (1964). The court also cited similar comments from the concurring opinions of Justices Marshall and Powell (Pet. App. A14). In addition, the court stated (*id.* at A15) that in conversing with respondent Detective Leaming had broken an express promise to respondent's attorney and that he had done so "not merely to find [the body], but also to obtain statements from [respondent] that might be used against him."³ The court con-

³ The State disputes the court's assertion that Detective Leaming broke any agreement with respondent's counsel (see Pet. Reply Br. 8-9). Moreover, in an article comprehensively reviewing the record of the first trial in this case, Professor Kamisar has concluded that the evidence does not support the existence of an agreement between Detective Leaming and respondent's counsel. See

cluded (*id.* at A16) that “[a] design to obtain incriminating evidence by mental coercion is a design to violate the Constitution.”

4. Rehearing en banc was denied by an equally divided court (Pet. App. A19). The dissenting judges would have granted rehearing en banc because of the importance of the case (*id.* at A20) and because it appeared doubtful that the issue of the officer’s good or bad faith had “*ever* been the subject of an evidentiary hearing” (*id.* at A21).

The panel also denied rehearing, but it wrote a supplemental opinion (Pet. App. A23-A27) responding to some of the contentions raised by the State in its petition for rehearing. First, the panel rejected the State’s contention that bad faith should not be a component of the inevitable discovery doctrine. The panel concluded that the State’s counsel had conceded that point at oral argument and held that, in any event, the absence of bad faith was a necessary component of the exception in order to preserve the deterrent effects of the exclusionary rule (*id.* at A24-A25). Second, the panel rejected the State’s suggestion that the standard for bad faith should be objective and not subjective. Again, the panel relied on concessions it deemed to have been made at oral argument and on the need for deterrence of police misconduct (*id.* at A25). Finally, the panel rejected the argument that the State had been unfairly taken by surprise and had never had the opportunity to prove good faith (*id.* at A25-A27).⁴

Kamisar, *Foreword: Brewer v. Williams—A Hard Look At A Discomfiting Record*, 66 Geo. L.J. 209, 212-213 & nn.23-24 (1977).

⁴ Not having participated in the oral argument before the court of appeals, we are in no position to evaluate the panel’s assertion that the State conceded various issues at that argument. But we do not read the panel’s opinion on rehearing as resting on the alleged concessions, since the panel independently ruled on the merits. Moreover, intelligent resolution of the questions before this Court necessarily requires that these issues be addressed, and we do so in this brief.

SUMMARY OF ARGUMENT

A. The "inevitable discovery" exception to the exclusionary rule finds its doctrinal underpinnings in this Court's explicit approval of the related "independent source" and "attenuation" doctrines. Thus, following this Court's lead in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), and *Wong Sun v. United States*, 371 U.S. 471 (1963), every federal court of appeals having jurisdiction over criminal cases has explicitly endorsed the inevitable discovery rule, as have the vast majority of state courts. All three doctrines rest on the premise that the severe sanction of the exclusionary rule should not be imposed in the absence of a sufficiently close causal connection between police misconduct and the discovery of the challenged evidence. When evidence would have been discovered regardless of any government misconduct, the misconduct is not a necessary or "but-for" cause of the discovery, and suppression under such circumstances results in an unnecessary windfall to the defendant at the expense of society's interest in convicting the guilty. An analogy may also be drawn to the "harmless error" rule, whereby not even constitutional errors require automatic reversal of a conviction. *Chapman v. California*, 386 U.S. 18, 21-22 (1967). Instead, the focus is on whether the error was likely to have changed the result of the trial (*id.* at 22).

B. Despite criticism to the contrary, the inevitable discovery doctrine does not require courts to engage in unwarranted speculation. So long as the government is held to a sufficiently strict substantive standard of proof, courts are fully capable of preventing abuse of the doctrine. In our view, the state supreme court correctly held that the prosecution must show that the challenged evidence *would* have been discovered in any event, and not merely that it "might have" or "could have" been discovered. That showing should be made by a preponderance of the evidence—the burden of proof generally applicable at all suppression hearings. See, *e.g.*, *United*

States v. Matlock, 415 U.S. 164, 178 n.14 (1974). A review of the State's evidence in this case clearly demonstrates that it satisfied this standard.

C. The absence of bad faith is neither a logical nor an appropriate component of the inevitable discovery doctrine. The premise of that doctrine is the lack of a necessary causal connection between the police misconduct and the discovery of the evidence, and the *mens rea* of the offending officer is irrelevant to the question of the presence or absence of that causal connection. The important point is to ensure that the police do not profit by their misconduct; that objective is fully realized by the strict standard of proof that we propose.

In any event, we doubt the validity of the court of appeals' assumption that, absent a good-faith component, the inevitable discovery doctrine would significantly weaken the deterrent effects of the exclusionary rule. Among other reasons, it seems quite improbable that a police officer would engage in conduct that he knew or reasonably believed to be illegal, thereby subjecting himself to possible civil liability and disciplinary action, when he anticipates that the evidence he seeks can be obtained through lawful means. And even if it were presumed that some slight amount of deterrence could be obtained by requiring proof of good faith, that incremental benefit would not overcome the societal costs imposed by the exclusionary rule in this type of case.

Finally, if good faith is deemed relevant at all, we submit that the inquiry should focus on the objective reasonableness of the police conduct, as measured against extant principles of law, rather than a particular officer's subjective state of mind. An objective inquiry will protect the judicial system against unduly burdensome and generally unproductive inquiries into the subjective state of mind of a particular officer, while at the same time ensuring that law enforcement officials are not encouraged to depart from established constitutional requirements.

ARGUMENT

ILLEGALLY OBTAINED EVIDENCE SHOULD NOT BE SUPPRESSED IF IT WOULD HAVE BEEN DISCOVERED BY LAWFUL MEANS NOT ENTAILING EXPLOITATION OF THE OFFICIAL MISCONDUCT

The "inevitable discovery" doctrine rests on the premise that the severe sanction of the exclusionary rule should not be invoked if the prosecution can establish that otherwise-tainted evidence would have been discovered in any event through lawful and predictable investigatory procedures. Although this Court has not expressly adopted the inevitable discovery doctrine, it has sown the seeds for the lower courts' widespread acceptance of that doctrine through explicit approval of analytically related exceptions to the "fruit of the poisonous tree" rule. Both the "independent source" exception first recognized in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), and the "attenuation" exception established in *Wong Sun v. United States*, 371 U.S. 471 (1963), serve as the doctrinal foundation for the inevitable discovery rule. Relying on this background, every federal court of appeals having jurisdiction over criminal matters, including the Eighth Circuit in a case decided shortly after the instant case, has endorsed the inevitable discovery doctrine. See *Wayne v. United States*, 318 F.2d 205, 209 (D.C. Cir.), cert. denied, 375 U.S. 860 (1963); *United States v. Bienvenue*, 632 F.2d 910, 914 (1st Cir. 1980); *United States v. Fisher*, 700 F.2d 780, 784 (2d Cir. 1983); *Government of the Virgin Islands v. Gereau*, 502 F.2d 914, 927-928 (3d Cir. 1974), cert. denied, 420 U.S. 909 (1975); *United States v. Seohnlein*, 423 F.2d 1051, 1053 (4th Cir.), cert. denied, 399 U.S. 913 (1970); *United States v. Brookins*, 614 F.2d 1037, 1042, 1044 (5th Cir. 1980); *Papp v. Jago*, 656 F.2d 221, 222 (6th Cir. 1981); *United States ex rel. Owens v. Twomey*, 508 F.2d 858, 865-866 (7th Cir. 1974); *United States v. Apker*, 705 F.2d 293, 306-307 (8th Cir. 1983); *United States v. Schmidt*, 573 F.2d

1057, 1065-1066 n.9 (9th Cir.), cert. denied, 439 U.S. 881 (1978);⁵ *United States v. Romero*, 692 F.2d 699, 704 (10th Cir. 1982); *United States v. Roper*, 681 F.2d 1354, 1358 (11th Cir. 1982).⁶ As we show below, the inevitable discovery doctrine is an eminently sensible rule having a firm footing in established principles governing the proper application of the exclusionary rule.

A. The Inevitable Discovery Doctrine Is A Logical Complement To The Independent Source And Attenuation Doctrines

1. Despite the exclusionary rule's broad purpose of deterring unlawful police conduct, this Court has long recognized that the rule is inapplicable when there is no significant causal relationship between the police misconduct and the discovery of the challenged evidence. This principle was first enunciated by the Court more than 60 years ago in *Silverthorne Lumber Co.* In that case, the Court held that the exclusionary rule applies not only to the illegally obtained evidence itself, but also to any evidence derived from or found through exploitation of the improper conduct. At the same time, however, the Court emphasized that such derivative evidence does not automatically "become sacred and inaccessible" (251 U.S. at 392). Rather, if the government's knowledge "is gained from an independent source [such facts] may be proved like any others * * *" (*ibid.*). See also *Costello*

⁵ Respondent cites *United States v. Hoffman*, 607 F.2d 280, 285 (9th Cir. 1979), for the proposition that "*Schmidt* did not indicate that [the Ninth Circuit] had adopted the [inevitable discovery] doctrine" (Br. in Opp. 13 n.4). But in several cases decided after *Hoffman*, the Ninth Circuit has relied on *Schmidt* and applied the doctrine. See, e.g., *United States v. Wiga*, 662 F.2d 1325, 1333 n.9 (9th Cir. 1981), cert. denied, 456 U.S. 918 (1982); *United States v. Huberts*, 637 F.2d 630, 638-639 (9th Cir. 1980), cert. denied, 451 U.S. 975 (1981); *United States v. Kandik*, 633 F.2d 1334, 1336 (9th Cir. 1980).

⁶ As the Supreme Court of Iowa noted, the state courts as well "appear to be nearly unanimous in their recognition and approval of the [inevitable discovery] rule" (Pet. App. A38 (citing cases)).

v. *United States*, 365 U.S. 265, 280 (1961); *Nardone v. United States*, 308 U.S. 338, 341 (1939).

In *Wong Sun*, the Court again recognized the general principle that illegally-obtained evidence need not always be suppressed. As the Court explained (371 U.S. at 487-488):

We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Maguire, Evidence of Guilt*, 221 (1959).

Accordingly, most "fruit of the poisonous tree" cases "begin with the premise that the challenged evidence is in some sense the product of illegal governmental activity." *United States v. Crews*, 445 U.S. 463, 471 (1980). But that premise is not necessarily controlling; under *Wong Sun*, the question remains "whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality." *United States v. Crews*, 445 U.S. at 471. See also *Dunaway v. New York*, 442 U.S. 200, 216-219 (1979); *United States v. Ceccolini*, 435 U.S. 268 (1978); *Brown v. Illinois*, 422 U.S. 590 (1975); *United States v. Wade*, 388 U.S. 218, 241 (1967).

2. As the courts of appeals have recognized, the inevitable discovery doctrine rests on the same absence of a sufficiently close connection between the state's wrongdoing and the discovery of the challenged evidence as the independent source and attenuation doctrines. See, e.g., *United States v. Alvarez-Porras*, 643 F.2d 54, 59-60 (2d Cir.), cert. denied, 454 U.S. 839 (1981); *United States v. Brookins*, 614 F.2d at 1041-1042; *United States*

ex rel. Owens v. Twomey, 508 F.2d at 865. It is of course true that when evidence is discovered as a direct result of government misconduct, that misconduct may be said to be the *de facto* cause of the discovery even if the evidence would have been found in any event. But the government misconduct in such a situation is no more *necessary* to the discovery of the evidence than it would have been if the actual discovery of the evidence had derived from a source independent of the illegality. In this sense, the illegality is not the cause of the discovery at all, for "[c]onduct is not a *legal* cause of an event if the event would have occurred without it." *United States v. Cole*, 463 F.2d 163, 173 (2d Cir.), cert. denied, 409 U.S. 942 (1972) (emphasis added). Cf. W. Prosser, *Law of Torts* § 41, at 242 (1964 ed.) ("A failure to fence a hole in the ice plays no part in causing the death of runaway horses which could not have been halted if the fence had been there" and "[t]he omission of a traffic signal to an automobile driver who could not have seen it if it had been given is not a cause of the ensuing collision."). As one commentator has explained (*Maguire, How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. Crim. L., Criminology & Police Sci. 307, 313 (1964) (emphasis added)):

[T]he exclusionary rule does not come into play merely because the proffered evidence is in fact the product of an illegal act. If the prosecution can establish that the illegal act merely contributed to the discovery of the allegedly tainted information and that such information would have been acquired lawfully even if the illegal act had never transpired, the presumptive taint is removed, and the apparently poisoned fruit is made whole. In other words, if the government establishes that the illegal act was not an *indispensable* cause of the discovery of the proffered evidence, the exclusionary rule does not apply.

In short, the exclusionary rule should no more apply when the challenged evidence inevitably would have been discovered regardless of the illegality than when it was

discovered before the illegality⁷ or when it was discovered after the illegality based on an independent source—for in each of these situations the illegality is not a necessary cause of the discovery of the evidence.

The inevitable discovery doctrine also comports with the rationale underlying the harmless-constitutional-error rule. As the Court explained in *Chapman v. California*, 386 U.S. 18, 22 (1967), that rule “serve[s] a very useful purpose insofar as [it] block[s] setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.” Here, too, the inevitable discovery doctrine serves to block setting aside convictions that would have been obtained without exploitation of the police error.

B. Properly Applied, The Inevitable Discovery Doctrine Is Neither Unduly Speculative Nor An Inducement To Unlawful Police Conduct

1. The inevitable discovery doctrine has been criticized as being too speculative. See, e.g., Comment, *Fruit of the Poisonous Tree: Recent Developments as Viewed Through Its Exceptions*, 31 U. Miami L. Rev. 615, 628 (1977). In fact, however, knowledge that the police would have discovered the evidence by lawful means may be virtually certain in some cases. See, e.g., *Government of the Virgin Islands v. Gereau*, 502 F.2d at 927-928. But we do not believe that a showing that the evidence would *certainly* have been discovered should be a prerequisite to application of the doctrine. If absolute certainty were a standard that prevailed throughout the law, the law would be altogether ineffectual; indeed, we convict people of crimes and send them to jail on a standard below that of absolute certainty. It is no doubt true that in almost any case in which the government invokes the inevitable discovery doctrine a scenario could be imagined in which the evidence would *not* inevitably have been

⁷ See *United States v. Crews*, 445 U.S. at 475 (Brennan, J.) (the exclusionary rule “does not reach backward to taint information that was in official hands prior to any illegality”).

found. But in *Nardone v. United States*, 308 U.S. at 341, this Court cautioned against the use of "[s]ophisticated argument" to establish a causal connection between the initial illegal conduct and the discovery of the challenged evidence, and that caution applies equally in the inevitable discovery context.

At the other extreme, we also do not suggest that the government may successfully invoke inevitable discovery if it can show only that the challenged evidence "might have" or "could have" been discovered without the illegality, as some courts have indicated. See, e.g., *United States v. O'Brien*, 174 F.2d 341, 346 (7th Cir. 1949); *Parts Mfg. Corp. v. Lynch*, 129 F.2d 841, 842 (2d Cir.), cert. denied, 317 U.S. 674 (1942). Rather, we believe that the government should be required to show a reasonable probability that the evidence *would* have been discovered. See, e.g., *United States v. Brookins*, 614 F.2d at 1048; *Wayne v. United States*, 318 F.2d at 209; LaCount & Girese, *The "Inevitable Discovery" Rule, An Evolving Exception to the Constitutional Exclusionary Rule*, 40 Alb. L. Rev. 483, 490 (1976); Maguire, 55 J. Crim. L., Criminology & Police Sci. at 315.

The nature of this showing naturally will vary depending on the circumstances of the individual case. In most cases, however, the showing will consist of proof that the police would have utilized (or, as in this case, that the police already had commenced utilization of) certain lawful and predictable investigatory procedures and that those procedures would have resulted in the discovery of the challenged evidence (see, e.g., *United States v. Brookins*, 614 F.2d at 1048-1049; *Government of the Virgin Islands v. Gereau*, 502 F.2d at 927-928; *United States v. Falley*, 489 F.2d 33, 40 (2d Cir. 1973); *United States v. Seohnlein*, 423 F.2d at 1053; *United States v. Carino*, 417 F.2d 117, 118 (2d Cir. 1969)), or that a person who is not a law enforcement official, such as a victim or a witness, would have voluntarily reported the evidence or information leading to the evidence to the police (see, e.g., *Wayne v. United States*, 318 F.2d at

209; *People v. Tucker*, 19 Mich. App. 320, 172 N.W.2d 712, 717-718 (1969), *aff'd*, 385 Mich. 594, 189 N.W.2d 290 (1971)).

In the instant case, the state supreme court expressly rejected a "might have" test (Pet. App. A44) and after careful consideration went on to find by a preponderance of the evidence that the police "would have" found the body of Pamela Powers in essentially the same condition it was in at the time of the actual discovery (Pet. App. A46-A49).^{*} The federal district court, after conducting its own independent review, reached the same conclusion (Pet. App. A78-A79). Because of its ruling on the question of bad faith (see page 5 note 2, *supra*), the court of appeals did not review these factual determinations

^{*} The state court's use of a preponderance of the evidence standard, upheld by the federal district court (Pet. App. A77-A78) and not addressed by the court of appeals, is consistent with this Court's observation that "the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence." *United States v. Matlock*, 415 U.S. 164, 178 n.14 (1974). See also *Lego v. Twomey*, 404 U.S. 477, 486-487 (1972). But see *United States v. Wade*, 388 U.S. at 240. In *United States v. Falley*, 489 F.2d at 41, the Second Circuit expressly adopted a preponderance of the evidence standard for purposes of applying the inevitable discovery doctrine, and two circuits have adopted that standard for the related independent source rule. See *United States v. Cales*, 493 F.2d 1215, 1216 (9th Cir. 1974); *United States v. Schipani*, 289 F.Supp. 43, 63-64 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). But see *Government of the Virgin Islands v. Gereau*, 502 F.2d at 927 (adopting without discussion a "clear and convincing evidence" standard for inevitable discovery cases).

In our view, the state supreme court correctly resolved the issue. If, as we propose, the prosecution is held to a high standard of substantive proof (i.e., proof that the evidence *would* have been discovered), then it becomes unnecessary and excessive to require that showing to be made by clear and convincing evidence. Indeed, the combination of the two heightened standards could well make the doctrine unworkable. We believe that the danger of unwarranted speculation can be adequately controlled by requiring the prosecution to show, by a preponderance of the evidence, that the challenged evidence would have been discovered in any event.

(Pet. App. A9), and thus a remand may be required for that purpose. But it is instructive to review some of the evidence actually offered by the State in this case because it demonstrates that courts are fully capable of applying the inevitable discovery doctrine without resort to unwarranted speculation.

At the suppression hearing preceding respondent's retrial, the State offered the testimony of Thomas Ruxlow of the Iowa Bureau of Criminal Investigation, whose task it had been to organize and direct the search for Pamela Powers' body (5/31/77 Tr. 33). Ruxlow testified that on December 26, 1968, approximately 200 people responded to a public appeal for volunteers to search for the girl (*id.* at 34). Ruxlow then testified that he marked off highway maps of Poweshiek and Jasper Counties in grid fashion, divided the volunteers into teams of four to six persons, and assigned each team to search specific grid areas (*ibid.*). Ruxlow further testified that, had it been necessary, the search would have been extended into Polk County, utilizing the same grid system (*id.* at 39-40).

Ruxlow testified that the search method he employed was commonly used by police and that he himself was experienced in directing this type of search (5/31/77 Tr. 34). Ruxlow also explained that the searchers were instructed "to check all the roads, the ditches, any culverts; they were instructed to get down and look into any culverts. If they came upon any abandoned farm buildings, they were instructed to go onto the property and search those abandoned farm buildings or any other places where a small child could be secreted" (*id.* at 35). During the course of the search, Ruxlow was advised that the searchers were in fact getting out of their vehicles and looking into ditches and culverts (*id.* at 48).

The search commenced at approximately 10 a.m. in Poweshiek County and moved westward through that county and through Jasper County to the county line separating Jasper County from Polk County (5/31/77 Tr. 36). At approximately 3 p.m., the search was sus-

pended, apparently because at that time respondent was about to direct Detective Leaming to evidence relating to the crime (*id.* at 51). Because respondent did in fact lead the police to the body, the search was never resumed (*id.* at 57). The body was found, however, in what would have been the first grid area to be searched in Polk County (*id.* at 39). Ruxlow testified that if the search had continued without interruption, that grid area would have been searched in approximately three to five hours (*id.* at 41).

Photographs of the body as it appeared upon discovery also were introduced into evidence. As the federal district court found (Pet. App. A80), the photographs showed that both the victim's face and an item of brightly colored clothing "were completely exposed to the view of any person looking at the end of the culvert."

In short, the State demonstrated that lawful and predictable systematic investigatory procedures had been underway for most of the day before respondent led the police to the body,⁹ that the location where the body was actually discovered was within the area to be searched, and that the searchers were only hours away from finding the body. In light of the nature of the crime, which produced an immediate response from 200 volunteers, it required no unwarranted speculation on the part of the courts that considered the issue to conclude that the search would have been carried to a successful conclusion.

2. Although the state supreme court viewed the test as objective while the court of appeals held that it should be subjective, both courts concluded that the absence of police bad faith is a necessary component of the inevitable discovery doctrine. Both courts thought that the absence of bad faith is required in order to preserve the deterrent effects of the exclusionary rule. As the court

⁹ In our view, this fact makes application of the inevitable discovery doctrine especially appropriate in this case. There can be no claim here that the facts relating to inevitable discovery constituted post hoc rationalization designed to overcome the police illegality; on the contrary, regular investigative procedures had in fact commenced well before the illegality occurred.

of appeals viewed the issue, "the temptation to risk deliberate violations of the Sixth Amendment would be too great, and the deterrent effect of the exclusionary rule reduced too far" were the rule otherwise (Pet. App. A10 n.5). In our view, however, the imposition of a good faith requirement, whether objective or subjective, misapprehends the theoretical basis underlying the inevitable discovery doctrine and rests on an exaggerated assessment of the doctrine's impact on the deterrent function of the exclusionary rule. Indeed, apart from the Eighth Circuit here, no federal court of appeals appears to regard good faith as a necessary component of the inevitable discovery doctrine.¹⁰ And even the Eighth Circuit, in its subsequent decision in *United States v. Apker, supra*, adopting the inevitable discovery doctrine, did not suggest the existence of a good faith requirement. Similarly, the Supreme Court of Iowa appears to be the only state court to hold that good faith plays any role in the inevitable discovery doctrine.

a. The inevitable discovery doctrine—like the independent source rule from which it derives—rests on the proposition that the substantial societal cost of excluding probative evidence because of police misconduct should not be incurred when there exists no necessary causal connection between the misconduct and the discovery of the challenged evidence. Once that proposition is accepted, it makes no sense to carve out an exception for bad faith police misconduct, because the *mens rea* of the offending officer is irrelevant to the question of the presence or absence of a causal connection. When there is no necessary causal connection between the illegality and the challenged evidence, the bad faith of the offending

¹⁰ In one case discussing the doctrine, the Second Circuit placed considerable weight on the officers' good faith, but the court also went to some pains to assert that it was not actually deciding the case on the basis of an inevitable discovery theory. *United States v. Alvarez-Porras*, 643 F.2d at 58-66. In a subsequent case, the Second Circuit applied the doctrine without any mention of good faith. *United States v. Fisher*, 700 F.2d at 784.

officer simply will not provide one. Indeed, we are aware of no case in which it has been suggested that application of the independent source rule depends upon the good faith of the offending officer.

If the initial illegality is to be treated as "purged" (see *Wong Sun v. United States*, 371 U.S. at 488), then it makes no sense to evaluate the seriousness of the "primary taint" even after it has been determined that it can be severed from the introduction of the challenged evidence. The key point, as stressed by one commentator, is that the government must not be allowed to benefit from the initial illegality (Maguire, 55 J. Crim. L., Criminology & Police Sci. at 313) :

[I]t is essential to the application of the federal exclusionary rule to keep constantly in mind that the benefit which it gives to a specific defendant is an unavoidable, and regrettable, consequence of the rule and not its purpose. This purpose frequently is stated to be to encourage full recognition of the fourth amendment by the authorities by "punishing" them when they violate its provisions. This formulation is somewhat misleading because it fails to include any reference to the one specific form which this "punishment" may take, *viz.*, refusal by the courts to allow the authorities to use in a criminal prosecution evidence which they would not have obtained if the violation had not taken place. In other words, the sanction is limited to preventing the authorities from "profiting" by their official misconduct. It does not extend so far as to allow an otherwise guilty defendant to go free *merely* because he has been the victim of an unlawful search or seizure.
* * *

This is the factor that permits the government to remove the taint from otherwise poisoned fruit by establishing that the unlawful act from which it resulted was not a *sine qua non* of its discovery.

Ensuring that the government does not profit from the initial illegality can be accomplished by holding the

government to a strict standard of proof in inevitable discovery cases (see pages 15-16 & note 8, *supra*). If the government is able to show that the evidence *would* inevitably have been discovered, the nature of the initial illegality becomes analytically irrelevant.

b. In any event, we doubt the validity of the premise that the inevitable discovery doctrine significantly threatens the deterrent function of the exclusionary rule by removing a significant disincentive to official illegality. Any extra amount of deterrence that might be obtained from requiring good faith as an element of the inevitable discovery doctrine is simply too speculative to outweigh the societal costs of suppressing evidence that would have been obtained in any event. It seems quite improbable that a police officer would engage in conduct he knew to be illegal in the hope that the government could later prove that it would have found the same evidence through lawful means. This case serves to demonstrate the point—as previously described (see pages 17-18, *supra*), the State had to put on extensive evidence about the nature of the on-going search for the body and convince the courts that that search would have been successful. It will almost always be easier to prove that the evidence was obtained lawfully than to prove hypothetical inevitable discovery, and any sensible police officer is likely to understand that fact. The Eighth Circuit made the same point in its subsequent decision adopting the inevitable discovery doctrine (*United States v. Apker*, 705 F.2d at 307):

[T]he deterrent effect of the exclusionary rule would remain because at the time police engage in an illegal search they would not know whether or not a later, legal discovery was inevitable. For instance, a police officer would not feel free to conduct a warrantless search while his partner is seeking a warrant. The officer would not know whether the warrant would be issued and what the scope of the search allowed by the warrant would be.

At the point at which an officer must decide what action to take, therefore, the possibility that the evidence he seeks would be discovered absent any illegality seems far too speculative to encourage unlawful "shortcuts." Cf. *United States v. Ceccolini*, 435 U.S. at 283 (Burger, C.J., concurring) ("the concept of effective deterrence assumes that the police officer consciously realizes the probable consequences of a presumably impermissible course of conduct").

To be sure, a law enforcement officer at the point of his misconduct may occasionally be able to anticipate that evidence obtained thereby will be admissible at trial under the inevitable discovery doctrine. But the more confident he is in that assessment, the less motivated he will be to seek the evidence by illegal means. Moreover, the state supreme court and the court of appeals, in imposing a good faith requirement, overlooked the existence of alternatives to the exclusionary rule that might deter law enforcement officers from taking improper advantage of the doctrine by bad faith constitutional violations. For example, intentional violation of an individual's constitutional rights may subject a federal agent to a civil action for damages. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971). In addition, such misconduct will ordinarily be punishable by departmental disciplinary measures and resort to disciplinary procedures is more likely when the illegality was not even needed to secure the evidence. These deterrents significantly reduce the danger that the inevitable discovery doctrine might encourage police misconduct, for it would be foolish for a police officer to risk civil liability or disciplinary measures when he knows that he does not have to do so in order for the government to obtain the evidence he seeks.

c. In support of a good faith requirement, respondent relies on this Court's decisions in *Brown v. Illinois*, *supra*, and *Dunaway v. New York*, *supra*. In *Brown* and *Dunaway*, the issue was whether the giving of *Miranda* warnings following an illegal arrest sufficiently attenu-

ated the taint of the arrest to permit the admission of the defendant's subsequent confession. In rejecting a rule that *Miranda* warnings, by themselves, always purge the taint of an illegal arrest, the Court in *Brown* expressed the well-justified concern that, under such a rule, "[a]rrests made without warrant or without probable cause, for questioning or 'investigation,' would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings"; consequently, "[a]ny incentive to avoid Fourth Amendment violations would be eviscerated * * *" (422 U.S. at 602; footnote omitted). Eschewing the proposed automatic attenuation rule, the Court held that in determining whether a confession is sufficiently attenuated from an unlawful arrest, a court must consider several additional factors: "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, * * * and, particularly, the purpose and flagrancy of the official misconduct * * *" (*id.* at 603-604; footnotes omitted). In *Dunaway*, the Court reaffirmed this multi-faceted inquiry (442 U.S. at 218). Respondent argues (Br. in Opp. 12) that "flagrancy is simply the opposite side of the coin of good faith" and that there is "no less reason to consider good faith under [the inevitable discovery] exception than under the 'attenuation' doctrine."

We disagree. There are significant distinctions between *Brown*-type attenuation cases and inevitable discovery cases that make it appropriate that they be treated differently. In *Brown*, the police probably would not have obtained the confession but for the illegal arrest. When the official misconduct is a direct and "but for" cause of a confession, the government may fairly be required to show that it has acted in good faith and has not merely manipulated events to avoid the consequences of its own intentional misconduct.

By contrast, the discovery of the evidence in the inevitable discovery context is never a "but for" conse-

quence of the police illegality; the whole point of the exception is that the evidence would have been discovered even if the illegality had not occurred. Furthermore, the applicability of the inevitable discovery doctrine in a particular case generally turns on circumstances outside the control of the offending officer; he cannot dissipate the taint by the "simple expedient" of performing some routine act such as the giving of *Miranda* warnings. As we have shown, the offending officer, at the point of his misconduct, will rarely be in a position to calculate whether the evidence he seeks would be discovered anyway; and even when he is in such a position, such knowledge would likely deter him from acting unlawfully, since there would be little point in his risking civil liability or disciplinary measures to obtain evidence that would in any event be discovered. Accordingly, the inevitable discovery doctrine poses nothing like the threat to effective deterrence that might flow from a rule enabling police officers to dissipate the taint of an illegal arrest merely by giving *Miranda* warnings.

d. Assuming *arguendo* that some incremental deterrence would be obtained by making good faith a necessary component of the inevitable discovery doctrine, nevertheless the maximization of deterrence has never been this Court's sole touchstone in deciding whether to apply the exclusionary rule to a particular class of cases. To the contrary, in recognition of the costs imposed by the exclusionary rule on the truthfinding process, the Court has restricted application of the rule "to those areas where its remedial objectives are thought most efficaciously served." *United States v. Calandra*, 414 U.S. 338, 348 (1974).

Moreover, the Court has recognized that in many circumstances "strict adherence" to the exclusionary rule "imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes." *Brown v. Illinois*, 422 U.S. at 609 (Powell, J., concurring). Thus, for example, the Court has refused to extend the benefit of the rule to persons other than those

whose own constitutional rights have been violated—even though such application might significantly increase the rule's deterrent impact—in recognition of the fact that the benefits of doing so would be outweighed by the “further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.” *Alderman v. United States*, 394 U.S. 165, 174-175 (1969). And “[e]ven in situations where the exclusionary rule is plainly applicable, [the Court has] declined to adopt a ‘per se or “but for” rule’ that would make inadmissible any evidence * * * which somehow came to light through a chain of causation that began with an illegal arrest.” *United States v. Ceccolini*, 435 U.S. at 276, citing *Brown v. Illinois*, 422 U.S. at 603.

In our submission, the costs of the exclusionary rule are simply too great to pay where the government would have discovered the challenged evidence regardless of the police misconduct. In the ordinary situation, the deterrent purpose of the exclusionary rule is presumably achieved by suppressing the evidence obtained as a result of the police illegality, since it is by the use of such evidence that the government would profit by its misconduct. But in the inevitable discovery context, the only benefit the government might derive from its illegality is a possible savings of time and perhaps resources, since the evidence eventually would be discovered in any event. In these circumstances, suppression is a disproportionate remedy. The Eighth Circuit itself has recognized this point, stating that probative evidence should not be excluded merely because police misconduct “affected the timing of the discovery of the evidence.” *United States v. Apker*, 705 F.2d at 307. Thus, as one commentator has observed, the inevitable discovery doctrine “serves well the *raison d’être* of the exclusionary rule by denying to the government the use of evidence ‘come at by the exploitation of * * * illegality’ and at the same time minimizes the opportunity for the defendant to receive an undeserved and socially undesirable bonanza.” Maguire, 55 J. Crim. L., Criminology & Police Sci. at 317.

e. Assuming arguendo that good faith is a necessary component of the inevitable discovery doctrine, we submit that the inquiry should focus on the objective reasonableness of the officer's conduct rather than the officer's subjective intent. See *Harlow v. Fitzgerald*, No. 80-945 (June 24, 1982) (holding that the good-faith defense in civil damages actions for alleged constitutional torts should have only an objective component); *People v. Adams*, 53 N.Y.2d 1, 9-10, 422 N.E.2d 537, 541 (1981) (adopting a good-faith exception to the exclusionary rule and stating that the test should be strictly objective). But see *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981) (adopting a good-faith exception entailing both an objective and a subjective component).

In *Harlow*, the Court rejected a subjective test in large part to protect public officials and the operations of government from the costs and disruptions of trials devoted to probing the mental processes of decisionmakers. See slip op. 15-17. While those concerns may not be as clearly applicable in the present context, equally significant considerations call for the same result. It will rarely be useful, though it will almost always be quite time-consuming, to probe the mental processes of police officers. Indeed, the court of appeals itself pointed out, perhaps unwittingly, one of the principal reasons for rejecting a subjective test. In holding that the record in this case failed to support Detective Leaming's subjective good faith, the court observed that "[w]e do not even have a self-serving statement from Leaming himself that he was unaware of any constitutional violation" (Pet. App. A13). It hardly seems sensible for courts to establish a test in which the self-serving statements of police officers may become decisive evidence.¹¹

¹¹ As an aside, it would appear that the reason Detective Leaming did not testify at the state court suppression hearing was because that hearing focused exclusively on the facts relating to the inevitability of the discovery. As to those facts, the key witness was the officer in charge of the search for the body, rather than

Under an objective standard for evaluating bad faith, therefore, unwieldy and awkward inquiries into the subjective intent of arresting or searching officers would be avoided. Instead, the inquiry would involve only an objective assessment of the officer's conduct in light of the factual circumstances of the case and the extent to which the governing legal principles have been predictably articulated. Furthermore, it seems unlikely that there will be many occasions on which a reasonable officer should not have known that his action was improper, but the particular officer did entertain such a belief; the inclusion of a subjective component will therefore rarely alter the result but would instead merely produce burdensome and largely unproductive litigation. See *Harlow*, slip op. at 18.

Contrary to the finding of the court of appeals here, there is no basis for concluding that Detective Leaming knew or should have known that his conduct was unconstitutional. The evidence showed that before the commencement of the trip to Des Moines, respondent was repeatedly advised of his rights by two attorneys, two sets of police officers, and a judge. *Brewer v. Williams*, 430 U.S. at 390-391; *id.* at 431 (White, J., dissenting). Once the trip began, it was respondent, not the officers, who started the conversation and opened up the subject of the criminal investigation (*id.* at 440 (Blackmun, J., dissenting); *Williams v. Brewer*, 509 F.2d 227, 235 (8th Cir. 1974) (Webster, J., dissenting)). During the course of the conversation, Detective Leaming made the so-called Christian burial speech, prefacing it by saying that this was something he wanted respondent to "think about" (430 U.S. at 392). When, following the speech, respondent asked Detective Leaming why he thought their route to Des Moines would be taking them past the body, Detective Leaming answered the question and then stated:

Detective Leaming. At the hearing on the habeas corpus petition in federal district court, there was likewise no need for Detective Leaming to testify because the state supreme court had by that time held that good faith was an objective matter, to be assessed against the then-prevailing state of the law, rather than what was in Detective Leaming's mind during the car ride.

"I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road." *Id.* at 393. Some considerable time thereafter, without any prompting on the part of any state official, respondent said that he would direct the officers to the body. *Ibid.*; *id.* at 433 (White, J., dissenting). Indeed, at no point during the trip, so far as any court has found, did the officers ask respondent any questions at all.

In holding by a five to four majority that Detective Leaming's conduct deprived respondent of his Sixth Amendment right to counsel, the court relied on *Massiah v. United States*, 377 U.S. 201 (1964). In that case, Massiah retained a lawyer, pleaded not guilty, and was released on bail. While he was free on bail and without his knowledge, a federal agent secured a confederate's consent to install a radio transmitter in the latter's car. The agent was thereby able to hear several incriminating statements elicited from Massiah by the confederate as the two men conversed in the car, and the statements were subsequently admitted at trial. This Court reversed Massiah's conviction on the ground that the statements had been deliberately elicited from him in the absence of his attorney, in violation of his right to counsel. *Id.* at 206.

Here, Detective Leaming could not reasonably have been expected to know that his conduct violated *Massiah*. First, unlike Massiah, respondent had been warned expressly that his statements could be used against him. Second, respondent knew that his statements were being noted by police officers, whereas in *Massiah* the Court emphasized that "'Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent.'" 377 U.S. at 206, quoting *United States v. Massiah*, 307 F.2d 62, 72-73 (2d Cir. 1962) (Hays, J., dissenting). Finally, Detective Leaming here asked respondent no questions but simply made a statement accompanied by a request that respondent make no response—indeed, insisting that there be no further discussion of the matter. And Detec-

tive Leaming did not even make the statement until respondent himself had broached the subject of the investigation.

It is difficult to see how Detective Leaming can fairly be held to knowledge that his conduct violated *Massiah* when four members of this Court, in vigorous dissents, reached just the opposite conclusion. For example, Justice Blackmun, in a dissenting opinion in which Justices White and Rehnquist joined, stated (430 U.S. at 439-440; emphasis added) :

I am not persuaded that Leaming's observations and comments, made as the police car traversed the snowy and slippery miles between Davenport and Des Moines that winter afternoon, were an interrogation, direct or subtle, of Williams. Contrary to this Court's statement, * * * the Iowa Supreme Court appears to me to have thought and held otherwise, *State v. Williams*, 182 N.W.2d 396, 403-405 (1970), and I agree. * * * Without further reviewing the circumstances of the trip, I would say it is *clear* there was no interrogation.

And Chief Justice Burger, also writing in dissent, stated (430 U.S. at 426 n.8) :

[T]here was no interrogation of Williams in the sense that term was used in *Massiah*, *Escobedo v. Illinois*, 378 U.S. 478 (1964), or *Miranda*. That the detective's statement appealed to Williams' conscience is not a sufficient reason to equate it to a police station grilling.

See also *id.* at 434, 436-437 n.6 (White, J., dissenting).¹²

¹² It is of course possible that *Brewer v. Williams* could have been decided as a *Miranda* case rather than a *Massiah* case. See Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?*, 67 Geo. L.J. 1, 28 (1978). But even then, it would be difficult to imagine how Detective Leaming was to have known that there was any constitutional transgression in his Christian burial speech when, at the time he made it, this Court had not yet decided *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (holding that "interrogation" for *Miranda* purposes is not limited

It is of course true that Detective Leaming was "hoping to find out where that little girl was" (430 U.S. at 399). But that objective does not equate with an intention to violate either the Fifth or Sixth Amendment, particularly in view of the fact that the victim had been missing for only two days and the police could not be certain she was dead. And in any event, there is an important difference between an intent to elicit information—an activity central to good police work—and an intent to elicit information with knowledge that to do so would violate the suspect's constitutional rights. The fact that Detective Leaming entertained a subjective desire to obtain information from respondent says nothing about whether he intended to try to do so by unconstitutional means or should have known that his conduct was unconstitutional. As the state supreme court concluded (Pet. App. A45), he cannot reasonably be held to such knowledge.¹³

to direct questioning but also encompasses words or actions on the part of the police that they "should know are reasonably likely to elicit an incriminating response from the suspect").

¹³ Even under the subjective bad faith test employed by the court of appeals, it would seem that Detective Leaming's desire to locate the body should be irrelevant. A policeman's desire to obtain evidence, which is, after all, his job, cannot support a finding of subjective bad faith. Instead, the relevant inquiry, even under a subjective test, would be whether Detective Leaming believed he was acting illegally in his quest for evidence.

In this regard, the evidence strongly suggests, contrary to the court of appeals' conclusion, that Detective Leaming's motives were beyond reproach. For one thing, he essentially volunteered to tell the Christian burial speech at the first suppression hearing (see *Kamisar*, 66 Geo. L.J. at 223 & n.65). This is not the action of an officer who believed he had committed some illegality. See also *Kamisar*, 67 Geo. L.J. at 1 (Leaming did not know what "psychological coercion" was until he looked up the words in the dictionary after being accused of using it). And, as previously noted (see pages 6-7 note 3, *supra*), the record does not support the premise, so heavily relied upon by the court of appeals, that Detective Leaming broke any promises to respondent's counsel.

Finally, although we did not participate in the lower court proceedings, it appears that the State correctly argues that the issue

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1983

of subjective bad faith was never litigated. Under these circumstances, fairness requires that the State be permitted the opportunity to offer proof on that issue, if indeed it has any relevance to this case. As already explained (see pages 26-27 note 11, *supra*), Detective Leaming's failure to testify at the second suppression hearing is fully understandable in light of the procedural posture of the case, and thus the State cannot be deemed to have waived its right to introduce his testimony.

No. 82-1651-CFH
Status: GRANTED

Title: Crispus Nix, Warden, Petitioner
V.
Robert Anthony Williams

Docketed:
April 7, 1983

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Appel, Brent Robert

Counsel for respondent: Bartels, Robert

Entry	Date	Note	Proceedings and Orders
1	Apr 7 1983	G	Petition for writ of certiorari filed.
2	May 9 1983		Brief amicus curiae of Illinois, et al. filed.
3	May 11 1983		DISTIPUTED. May 26, 1983
4	May 16 1983	X	Brief of respondent in opposition filed.
5	May 16 1983	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	May 23 1983		DISTIBUTED. May 26, 1983. (Above motion).
7	May 25 1983	X	Reply brief of petitioner (and appendix) filed.
8	May 31 1983		Motion of respondent for leave to proceed in forma pauperis GRANTED.
9	May 31 1983		Petition GRANTED.
10	Jun 6 1983	G	Motion of respondent for appointment of counsel filed.
11	Jun 13 1983		DISTIPUTED. June 16, 1983. (Motion of respondent for appointment of counsel).
12	Jun 20 1983		Motion for appointment of counsel GRANTED and it is ordered that Robert Bartels, Esquire, of Tempe, Arizona, is appointed to serve as counsel for the respondent in this case.
14	Jun 20 1983		Order extending time to file response to petition until August 15, 1983.
15	Aug 15 1983		Brief amicus curiae of United States filed.
16	Aug 16 1983		Brief amicus curiae of The Legal Foundation of America, et al. filed.
17	Aug 18 1983		Brief of petitioner Crispus Nix, Warden filed.
18	Aug 18 1983		Joint appendix filed.
19	Aug 18 1983		Brief amicus curiae of Illinois, et al. filed.
21	Aug 26 1983		Order extending time to file response to petition until October 13, 1983.
22	Aug 31 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
23	Sep 6 1983		Record filed.
24	Sep 6 1983		Seven volume certified transcript of record received.
25	Oct 3 1983		Motion of the Solicitor General for leave to participate in oral GRANTED.
26	Oct 13 1983		Brief amicus curiae of National Legal Aid and Defender Assn. filed.
27	Oct 17 1983		Brief of respondent Robert A. Williams filed.
29	Nov 14 1983		Supplemental brief of respondent Robert A. Williams filed.

Entry	Date	Note	Proceedings and Orders
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30	Nov 15 1983	CIRCULATED.	
31	Nov 23 1983	SET FOR ARGUMENT. Wednesday, January 18, 1984. (3rd case)	
32	Jan 10 1984	X Reply brief of petitioner Crispus Nix, Warden filed.	
34	Jan 16 1984	Second supplemental brief of respondent Robert A. Williams filed.	
35	Jan 18 1984	ARGUED.	